TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. 666. 358.

WILLIAM DREIER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 1, 1909.

(21,886.)

(21,886.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 660.

WILLIAM DREIER, PLAINTIFF IN ERROR,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1910.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between William Dreier, Plaintiff in error vs. United States, Defendant in error a manifest error hath happened, to the great damage of the said William Dreier as is said and appears by his complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Judges of the United States Supreme Court together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 11th day of September 1909, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court, Southern District of New York, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of August in the year of our Lord one thousand nine hundred and nine and
2 of the Independence of the United States the one hundred and thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

C. M. HOUGH,
U. S. District Judge, Holding Circuit Court.

Pending the appeal herein the defendant is admitted to five hundred — ($500.00) bail.

C. M. HOUGH,
U. S. Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience

thereto, do hereby certify, that the following pages numbered from *three* to 28 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of

2½ William Dreier, Plaintiff in Error, against The United States, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the Seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of October *October* in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

3 [Endorsed:] 2/183. E. & A. 2972. United States Circuit Court, Southern District of New York. William Dreier, Plaintiff in Error, against The United States, Defendant in Error. (Original) Writ of Error. W. Wickham Smith, Att'y for Pl't'f in Error, 32 Broadway, New York City. P. A copy of the within paper has been this day received at this office. Aug. 25, 1909. Henry A. Wise, U. S. Attorney.

4 At a Stated Term of the Circuit Court of the United States held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 16th day of August, in the year one thousand nine hundred and nine.

Present: Honorable Learned Hand, District Judge holding Circuit Court.

In the Matter of WILLIAM DREIER, a Witness Charged with Contempt of Court by the Grand Jury of the Circuit Court of the United States for the Southern District of New York.

On the consent of W. Wickham Smith, Esq., attorney for William Dreier, the witness herein, and Henry A. Wise, United States Attorney for the Southern District of New York, it is

Ordered that the order entered herein on the 5th day of August, in the year one thousand nine hundred and nine, be resettled *nunc pro tunc,* to read as follows:

At a Stated Term of the Circuit Court of the United States held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 5th day of August, in the year one thousand nine hundred and nine.

Present: Honorable Learned Hand, District Judge holding Circuit Court.

In the Matter of WILLIAM DREIER, a Witness Charged with Contempt of Court by the Grand Jury of the Circuit Court of the United States for the Southern District of New York.

5 The Grand Jury of the Circuit Court of the United States for the Southern District of New York, having on the fifth day of August, 1909, made a presentment to this Court stating that William Dreier, Secretary of the Lichtenstein Millinery Co. had, in the course of an investigation that the Grand Jury was then making into certain alleged violations of the Customs Laws of the United States by N. Hayes and others, been subpœnaed to produce before the Grand Jury certain books and records of the Lichtenstein Millinery Company relating to the importation of women's wearing apparel and materials thereof from Paris from July 1, 1905 to July 1, 1909, also all check books, check stub books, and all returned checks covering the same period; that on July 27th, 1909, in obedience to said subpœna, William Dreier appeared with counsel and stated that the subpœna would be obeyed, but asked for further time to get the records called for together; that it was arranged with counsel and William Dreier by the United States Attorney that said William Dreier should produce on the following day, July 28th, such of the documents called for as it was possible for him to collect before that time and that the other papers should be produced on August 2nd. On July 28th, WILLIAM DREIER appeared before the Grand Jury and after being duly sworn testified as follows:

Q. You are the treasurer of the Lichtenstein Millinery Co.
A. No, sir; secretary.
Q. As Secretary you have custody of their books?
A. Yes.
Q. And you have produced here certain books?
A. Yes.
Q. What books have you produced?
A. The ledger, cash book, journal and stub check book and cancelled checks and invoices covering the period of time about 1908 to the present time.

6 Q. You are engaged in trying to get together the other books and papers called for by the subpœna?
A. Yes.
Q. When do you think you will be able to get them together?
A. In a few days. About Monday next I think.

After the witness had withdrawn from the Grand Jury room leaving said papers in the custody of the Grand Jury, for their examination, the said witness and his counsel, a representative of the

firm of Choate & Larocque, stated to the District Attorney that the books which had been produced were in daily use by the corporation, that it was necessary to make daily entries in the same, and that it would be a great embarrassment to the business of the company if they were retained in the Grand Jury room during the Grand Jury examination of the same; that in pursuance of the said request of counsel and his assurance given in the presence of his client that said books and papers would be returned for further examination by the Grand Jury on the following Monday, August 2nd, when the other books called for by the subpœna were to be produced, said William Dreier was, on the afternoon of July 28th, 1909, permitted to withdraw temporarily the said books and records so produced, from the Grand Jury room pending their further examination by the Grand Jury. On August 2nd said WILLIAM DREIER again appeared before the Grand Jury and testified as follows:

Q. You have been before the Grand Jury before and were subpœnaed to produce certain books and records of your corporation?

A. Yes, sir.

Q. And have you produced them?

A. No sir.

Q. You are the secretary of the corporation and are the custodian of the books of the corporation?

A. Yes, sir.

Q. Why have you not obeyed the direction of the Grand Jury?

A. I refuse to produce them on the ground that they might incriminate the company or myself.

7 Q. That is that the production of the books might incriminate you?

A. Yes.

Q. Do you believe it might?

A. Yes sir.

Q. Do you believe it might incriminate the company?

A. Yes sir.

Q. Are you acting under advice of counsel?

A. Yes, sir.

Q. Who is your counsel?

A. Mr. Smith of Curie, Smith & Maxwell.

Q. Mr. Wickham Smith?

A. I don't know what his first name is.

Q. You have changed your counsel, then, since you were here before?

A. Yes sir.

Q. And you recall that you were here before and did produce certain of those books, and that your counsel gave assurances to the District Attorney that they would be produced here to-day in your presence?

A. Yes sir.

Q. And you have similar instructions?

A. I said I would try to bring them.

Q. Aren't you secretary of the company and have the custody of the books?

A. Yes sir.

Q. Well, who could stop you from bringing them?
A. Nobody that I know of.
Q. You say you tried to bring them?
A. Yes, I tried. I refuse to produce them on the ground that they might tend to incriminate the company or myself.
Q. You have decided to refuse to produce them in spite of what your counsel said when he was here before and what you said?
A. Other counsel gave me different advice.
The FOREMAN: The Grand Jury instructs you to produce the books of the corporation next Thursday at half past ten.
The WITNESS: Three days from now, yes.

8 Thereafter, on August 5th, in pursuance of the direction of the Grand Jury, said WILLIAM DREIER again appeared before it and testified as follows:

Q. Who are the directors of the Lichtenstein Millinery Co.?
A. Isaac Lichtenstein, Jacob Lichtenstein and Abraham Lichtenstein.
Q. Never have been any other directors to your knowledge for a good many years?
A. At the incorporation there were different directors in '95.
Q. What is Jacob Lichtenstein?
A. President.
Q. What is Abraham Lichtenstein?
A. Treasurer.
Q. And you are secretary?
A. Yes.
Q. As I understand it, Mr. Dreier, Mr. Jacob Lichtenstein is abroad?
A. No, he got back Tuesday.
Q. Is he at the place of business?
A. I don't know whether he is or not; he was not there when I left.
Q. Is Abraham Lichtenstein there to-day?
—. Yes.
Q. Do you expect Abraham Lichtenstein to be there from time to time?
A. He comes there every day.
Q. Where does he live?
A. Far Rockaway?
Q. What is his address at Far Rockaway?
A. Central Avenue and Oak Street.
Q. Where does Jacob Lichtenstein live?
A. Same place.
Q. You have had nothing to do with the foreign business of the concern, have you—buying?
A. Nothing at all.
Q. Your duties are confined?
A. Office work entirely; credits and things like that.
Q. Obtaining credits for the purchase of merchandise?
A. Granting credit to customers.

Q. Who attends to the custom house work?

A. I make the entries—a broker does it for me, of course.

Q. All you do is to see the invoices and turn them over to the broker?

A. Yes.

9 Q. You receive those yourself?

A. Yes sir. Sometimes I open the mail and sometimes I don't.

Q. Do you have anything to do with any other importations except those which come through the mail?

A. Only that I figure the goods from the bills and tell them the prices.

Q. In order to fix the price at which those goods shall be sold you look at the bills and mark the prices on the boxes, do you?

A. Yes, I tell them the prices.

Q. You have nothing to do with the buying?

A. Nothing at all.

Q. Have you anything to do with the remittances abroad?

A. I always send the money abroad. I always order the cables—buy it.

Q. How do you know how much to buy?

A. Well according to the amount of the account.

Q. Do you receive instructions in regard to that?

A. I do it myself.

Q. You see how much is owing and buy that amount of exchange?

A. That is right.

Q. The consular invoices which you receive are of course always executed before the consul in Paris by your Commissionaire?

A. That is right.

Q. Have you anything to do with the importation of the model gowns?

A. Nothing further than to mark them; that's all.

Q. How about paying for them?

A. I pay on account all the time, sending drafts for 100,000 francs, 50,000 francs.

Q. You pay those drafts through Rosenburg?

A. I pay them generally through the American Express Co.—buy the exchange from them and they cable it direct.

Q. You don't pay the individual model makers from

10 whom the dresses are purchased?

A. No, only send the money to Rosenberg.

Q. You haven't anything to do with the arrangements for shipping these model gowns to this country.

A. Nothing at all.

Q. They are made entirely by Jacob Lichtenstein?

A. When he is in Paris.

Q. You have never entered into any arrangements for their shipment?

A. No sir.

Q. Have you any knowledge of any illicit importations of any of these gowns?

A. No sir.
Q. Or any of your materials?
A. Nothing at all.
Q. You haven't any knowledge of any offense against the customs laws?
A. Nothing that I know of.
Q. You have never taken any part to your knowledge in any offense against the customs laws?
A. Not that I know of.
Q. You don't believe that you have been guilty of the commission of any crime in connection with the importation of any goods?
A. No, nothing at all.
Q. You have been subpœnaed to produce certain books?
A. I haven't produced them on the ground that it might incriminate myself or the company of which I am an officer.
Q. You have testified that you have never committed any offense against the customs laws of the United States in any way?
A. I must refuse to produce the books on that ground.
Q. So far as you know you have never broken any law of the United States?
A. I don't like to answer that question on the same grounds.
Q. Do you desire to change your testimony as to your not having violated any of the customs laws.
A. Yes sir. I refuse to answer on the ground that it might tend to incriminate myself or the company of which I am an officer.

11 Q. You have been subpœnaed to produce certain books before the Grand Jury?
A. Yes.
Q. Which you requested that you be permitted to take away as being books actually in use by your company?
A. Yes sir.
Q. And that you would hold them subject to the call of the Grand Jury on the following Monday?
A. No sir, I didn't.
Q. Didn't you state you would return them on the following Monday?
A. You told me to bring them back but I didn't say I would.
Q. Didn't you say that those would be returned on Monday?
A. You told me to bring them back, but I didn't say I would. I had full intention of bringing them back but I did not promise to bring them back.
Q. You understood that the Grand Jury wasn't through with them?
A. I presumed that was the case.
Q. Didn't you say that one reason why you wanted to take them was so that you could make certain notations which would make it clearer to what certain accounts related?
A. I offered to do that, but that wasn't the reason why I took them. They were books actually in use and books we were using at the present time.
Q. Your counsel was present at that time?

A. Yes, he was present.
Q. Who was your counsel?
A. Mr. Bayes.
Q. He joined in the request that you might be permitted to take them away temporarily?
A. He spoke to you about that but I didn't hear everything he said to you. I understood that he was going to get them all until he told me afterwards.
Q. You did get them all?
A. Yes sir I think I did.

Q. You had every intention of bringing those back to
12 the Grand Jury?

A. Yes, until I saw those other attorneys.

Q. You had consulted Mr. Bayes in regard to the matter in the first instance?
A. Yes sir.
Q. And took his advice and produced them?
A. Yes sir.
Q. Those books have remained in your custody and still are in your custody as secretary?
A. Yes sir.

And after stating these facts to the Court the Grand Jury having presented charges that said witness, William Dreier, was in contempt of court in refusing to produce said books, records and papers before the Grand Jury, that in the opinion of the Grand Jury the witness was endeavoring to use the plea of privilege as a shield to others, and that as to himself it was made frivolously and in bad faith, and said William Dreier being then present in court and having been asked by the Court as to whether he had brought said books and papers to the Grand Jury room, and having answered that he had not, was directed by the Court to produce said books and papers before the Grand Jury at four o'clock in the afternoon of said August 5th or stand committed for contempt of court; and on the afternoon of said August 5th said Grand Jury having again made further presentment to the Court stating that the witness, WILLIAM DREIER, had appeared before them and testified as follows:

Q. Have you produced the books in obedience to the direction of the Court?
A. I have.
Q. Will you bring them in now?
A. I refuse to produce them on the ground that they will incriminate me.
Q. Where are the books?
A. Right here at the door.
Q. Will you bring them in to the Grand Jury room?

Witness directs them to be brought in.

Q. In obedience to the direction of the Court have you
13 brought into the Grand Jury room the books and papers required by the order of the Court?

A. Yes.

Q. Will you separate from the rest of the books and papers those that you produced before the Grand Jury on July 28th?
A. I didn't keep the record of them.
Q. It may refresh your recollection by reading your testimony of July 28th?
A. I am taking different dates.
Q. Have you separated those books now as directed?
A. Yes.
Q. Are the books nearest the stenographer the books previously in the grand jury room produced by you?
A. Yes.
Q. The rest of the books are the other books that were called for by the subpœna?
A. Yes.
Q. Do you produce these books for examination by the grand jury?
A. I refuse to produce them on the ground it will tend to incriminate me.
Q. You withdraw the ground that it will incriminate the corporation?
A. Only that it will incriminate me.
Q. You have brought back to the grand jury room the books that were here before?
A. I have.
Q. And in addition you have brought the other books which you stated to the grand jury you would try to bring?
A. Yes.
Q. You refuse to permit the grand jury to make any examination of these books?
A. On the ground that it might incriminate me.

And said Grand Jury having presented charges of contempt of Court against said William Dreier for his failure to produce said books and papers for examination before the Grand Jury or any of them, for his refusal to permit the Grand Jury to make an examination of said books and papers or any of them, and said William Dreier having appeared in open Court to answer said charges; after hearing said presentment and said William Dreier and Wick-
14 ham Smith, Esq., of counsel for said William Dreier, in answer to said charges, and said William Dreier having been directed by the court to produce said books and papers for examination by the Grand Jury and to permit an examination by said Grand Jury of said books and papers, said William Dreier having refused to produce before the Grand Jury for its examination or permit the examination of the books and papers by the Grand Jury or any of them, and due deliberation having been had, it is

Ordered and adjudged by the Court that the said William Dreier be, and he hereby is adjudged to be in contempt of this Court for failure to produce said books and papers before the said Grand Jury for its examination or to permit an examination by said Grand Jury of said books and papers in obedience to the order of this Court.

And it is further ordered and adjudged that he be committed to

the custody of the marshal until he produces before the Grand Jury for their examination said books and records, or permits an examination by said Grand Jury of said books and records, or is discharged by due process of law.

LEARNED HAND,
United States Judge.

LEARNED HAND,
United States Judge.

Entry of the foregoing order is hereby consented to.
W. WICKHAM SMITH,
Attorney for William Dreier.
HENRY A. WISE,
United States Attorney for the Southern District of New York.

Dated, New York, August 16th, 1909.

15 Endorsed: U. S. Circuit Court, Southern District of New York. In the Matter of William Dreier, a witness charged with contempt of Court, etc. Order. Henry A. Wise, United States Attorney, Attorney for U. S.—U. S. Circuit Court, Southern District of N. Y., Filed Aug. 19, 1909, John A. Shields, Clerk.

16 Circuit Court of the United States, Southern District of New York.

In the Matter of WILLIAM DRIER, a Witness Charged with Contempt of Court by the Grand Jury of the Circuit Court of the United States for the Southern District of New York.

The Grand Jury of the Circuit Court of the United States for the Southern District of New York having on the 5th day of August, 1909, presented to this Court charges of contempt of court on the part of William Drier, a witness before said Grand Jury, for failure to produce before said Grand Jury, for its examination, in obedience to a subpœna of this court certain books and records of the Lichtenstein Millinery Company, to wit: all books containing entries concerning or relating to importations of women's wearing apparel and materials thereof from Paris covering the period from July 1, 1905, to July 1, 1909; also all check books, check stub books and all returned checks covering the same period, and said witness on that day appearing in person in open court on said charges, and said witness having refused to obey the direction of the Court to produce said books and records, and an order having thereupon been made in writing by this court on August 5th, 1909, wherein it was ordered and adjudged by this court that said William Drier be adjudged to be in contempt of this court for failure to produce said books and records before said Grand Jury in obedience to the order of this court, and that he be committed to the custody of the Mar-
17 shal until he produces said books and records, or is discharged by due process of law.

This, therefore, is to command the United States Marshal for the Southern District of New York to take and receive said William Drier into his custody in pursuance of the aforesaid order of the court and to detain him until he complies with the aforesaid order of the court by producing before Grand Jury said books and papers, or is discharged by due process of law.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord One thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,
United States District Judge Sitting in the Circuit Court.

Endorsed: U. S. Circuit Court, Southern District of New York. In the Matter of William Drier, a witness charged with contempt of court by the Grand Jury of the Circuit Court for the S. D. N. Y. Commitment. Henry A. Wise, United States Attorney, Attorney for U. S.—U. S. Circuit Court, Southern District of N. Y., Filed Aug. 6, 1909, John A. Shields, Clerk.

Prisoner arrested upon the within Commitment and I now hold him in my custody until the further order of the Court.

New York, Aug. 9, 1909.

WM. HENKEL,
U. S. Marshal.

The prisoner is paroled in the custody of W. Wickham Smith, Esq., until the decision upon habeas corpus provided the same be applied for by Monday, August 9th, 1909.

L. H., *J.*

18 Parol continued until Wednesday Aug. 11th at 10 A. M.

C. M. H., *J.*

8/9/09.

Let relator continue in custody of W. W. Smith, Esq., his counsel until further order from the Court.

8/9/09.

C. M. H., *J.*

19 United States Circuit Court, Southern District of New York.

WILLIAM DREIER, Plaintiff in Error,
against
WILLIAM HENKEL, Defendant in Error.

Assignment of Errors.

The Plaintiff in Error, William Dreier, hereby assigns errors for the Order for his Committment of August 5th, 1909, as follows:

1. It was error for the said Court to hold that said plaintiff in error had been guilty of contempt of court in refusing to permit the examination of books in his custody on the ground that the entries contained in said books might tend to incriminate him.

2. It was error for the said Court to hold that said plaintiff in error was not entitled to claim privilege for producing before the Grand Jury books or documents which he had sworn might tend to incriminate him.

3. It was error for said Court to hold that if said plaintiff in error had any privilege in producing before the Grand Jury books or documents that might tend to incriminate him, he had by any action on his part, waived such privilege.

4. It was error for the said Court to hold that any answers the plaintiff in error might have made to questions asked by the Grand Jury or any act of his in producing books or documents before the Grand Jury in any way estopped said appellant from claim-
20 ing his privilege at any time after further consideration or consultation with counsel.

5. It was error for said Court to hold anything but a clear, express and unequivocal waiver of his privilege against producing books or documents before the Grand Jury to estop said plaintiff in error from pleading his privilege or refusing to permit the inspection of books or documents in his custody at any time.

6. It was error for said Court to order the committment of plaintiff in error for contempt and to refuse to discharge him from custody.

Dated New York, August 20th, 1909.

W. WICKHAM SMITH,
Attorney for Plaintiff in Error,
32 *Broadway, New York City.*

Endorsed: United States Circuit Court, Southern District of New York. William Dreier, Plaintiff-in-Error, against The United States, Defendant-in-Error. Assignment of errors. Ordered on file, C. M. Hough, 8/21/09. U. S. Circuit Court, Southern District of N. Y., Filed Aug. 23, 1909, John A. Shields, Clerk.

21 Know all men by these presents, That I, Henry B. J. Craig, am held and firmly bound unto the United States of America in the sum of Two hundred and fifty ($250.00) dollars to be paid to the said United States of America.

For the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with my seal and dated the 14th day of August in the year of our Lord one thousand nine hundred and nine.

Whereas William Dreier has applied to the Supreme Court of the United States by appeal for a review of the questions of law and fact involved in a certain decision filed in the office of the Clerk of the United States Circuit Court for the Southern District of New York on the 16th day of August, 1909, dismissing a Writ of Habeas Corpus herein,

Now, therefore, the condition of this obligation is such, that if the above named William Dreier shall prosecute said proceedings with effect and pay all costs which shall be awarded against him or if he shall fail to make said proceeding good then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

HENRY B. J. CRAIG. [SEAL.]

Sealed and delivered and taken and acknowledged this 14th day of August, 1909, before me

ELY NEUMANN,
Notary Public, New York County.

22 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Henry B. J. Craig being duly sworn, deposes and says that he resides in the Southern District of New York in the City of New York; and that he is worth the sum of Five hundred ($500.00) Dollars over and above all his just debts and liabilities.

HENRY B. J. CRAIG.

Sworn to before me this 14th day of August, 1909.

[SEAL.]

ELY NEUMANN,
Notary Public, New York County.

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, August 16, 1909.

C. M. HOUGH,
U. S. District Judge, Holding Circuit Court.

Endorsed: United States Circuit Court, Southern District of New York. William Dreier, Plaintiff-in-Error, against The United States, Defendant-in-Error. Bond for Costs (On Writ of Error) U. S. Circuit Court, Southern District of N. Y., Filed Aug. 23, 1909, John A. Shields, Clerk.

23 United States Circuit Court, Southern District of New York.

WILLIAM DREIER, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error.

It is hereby stipulated that the foregoing record comprises and includes all the proceedings in the cause above entitled.

Dated, New York, October 23, 1909.

W. WICKHAM SMITH,
Attorney for Plaintiff in Error.
HENRY A. WISE,
United States Attorney, Attorney for Defendant in Error.

24 UNITED STATES OF AMERICA, *ss:*

To the United States:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington on the 11th day of September, 1909, pursuant to a writ of error, from an order committing William Dreier for contempt of Court, filed August 5th, 1909, in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, to show cause, if any there be, why the decision of the United States Circuit Court of the Southern District of New York in the said writ of error mentioned, should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand — the City of New York in the Southern District of New York on the 20th day of August, 1909.

C. M. HOUGH,
U. S. District Judge, Holding U. S. Circuit Court.

25 [Endorsed:] 2/183. E. & A. 2972. Supreme Court of the United States. William Dreier, Plaintiff in Error, against The United States, Defendant in Error. (Original) Citation. (On Writ of Error to Judg't.) W. Wickham Smith, Att'y for Pl't'f in Error, 32 Broadway, New York City. A copy of the within paper has been this day received at this office. Aug. 25, 1909. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District, N. Y. Filed Aug. 30, 1909. John A. Shields, Clerk.

26 [Endorsed:] United States Supreme Court. William Dreier, Pl'ff in Error, vs. The United States, Def't in Error.

Endorsed on cover: File No. 21,886. S. New York, C. C. U. S. Term No. 660. William Dreier, Plaintiff in Error, vs. The United States. Filed November 1st, 1909. File No. 21,886.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 357.

WILLIAM DREIER, APPELLANT,

vs.

WILLIAM HENKEL, U.S. MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 1, 1910.

(21,887.)

(21,887.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 661.

WILLIAM DREIER, APPELLANT,

vs.

WILLIAM HENKEL, U. S. MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1910.

1 *Petition.*

United States Circuit Court, Southern District of New York.

In the Matter of the Application of WILLIAM DREIER for a Writ of Habeas Corpus.

To the Circuit Court of the United States for the Southern District of New York:

The petition of William Dreier respectfully shows: That the petitioner herein is a citizen of the United States residing in the Eastern District of New York and is imprisoned and restrained of his liberty in the custody of one William Henkel, Marshal of the United States within and for the Southern District of New York, City of New York, held under a commitment by His Honor, Justice Learned Hand, as punishment for contempt of court, in that your petitioner failed to comply with an order of this Court under the following circumstances:

That at all the times hereinafter mentioned, your petitioner was and is the Secretary of the Lichtenstein Millinery Company, a domestic corporation doing business in the Southern District of New York and whose business is millinery and dresses, including the importation of the same.

That on or about the 27th day of July, 1909, your petitioner was served with a subpœna, a copy of which is hereto annexed and made a part of this affidavit.

That pursuant to the directions contained in the subpœna, your petitioner presented himself in the presence of the Grand Jury. That after being sworn and having testified as to certain facts when questioned with regard to the entries in the books, your petitioner declined to answer those questions or to produce the books on the ground that the production of said books before the Grand
2 Jury might tend to incriminate him and that he therefore declined to produce said books as required by the subpœna.

That your petitioner as the Secretary of the Lichtenstein Millinery Company makes oath and affidavit to the Customs House entries upon which goods from foreign countries are entered at the Custom House at New York for the said Company and that said books contain the purchase price at which said merchandise was purchased abroad and that your petitioner is advised and informed by counsel and verily believes, that the production of said books before the Grand Jury might be competent evidence against him for the prosecution of frauds on the revenue under Section 9 of the Customs Administrative Act of June 10, 1890.

That upon your petitioner's refusal to produce the said books for the inspection of the Grand Jury, your petitioner was taken before His Honor, Justice Hand, about one P. M. on August 5th, 1909, and directed by his Honor to bring all the books of the period covered by the subpœna for the inspection of the Grand Jury and

have them there at 4 P. M. on that day. That thereupon and at 4 P. M. on said day, your deponent appeared in the Grand Jury Room with the said books as directed by his Honor, but declined to produce the books for the inspection of the Grand Jury and thereupon your petitioner appeared with his counsel before his Honor, Justice Hand, and thereupon your petitioner was committed by the Justice in the custody of the Marshal as punishment for contempt for failure to produce the books for inspection by the Grand Jury.

That your petitioner is restrained of his liberty without due process of law and that his punishment for contempt of court is without warrant in law.

3 Wherefore your petitioner prays that a Writ of Habeas Corpus issue forthwith directed to the person having your petitioner in custody and commanding him to bring the body of your petitioner before this court forthwith for such action thereon as may be proper in the premises and further commanding that he return all proceedings against your petitioner to this court forthwith for such action as may be proper in the premises.

WILLIAM DREIER, *Petitioner.*

UNITED STATES OF AMERICA,
Southern District of New York:

William Dreier, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

WILLIAM DREIER.

Sworn to before me this 6th day of August, 1909.

ELY NEUMANN,
Notary Public, New York County.

4 *Subpœna.*

[L. S.] The President of the United States of America to William Dreier, Treasurer Lichtenstein Millinery Co., 538 Fifth Ave., New York, N. Y., Greeting:

We command you, That all business and excuses being laid aside, you appear and attend before the Grand Inquest of the body of the People of the United States of America, for the Southern District of New York, at a Circuit Court to be held at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, in and for the said Southern District of New York on the 27th day of July 1909, at 10:30 o'clock in the forenoon, to testify before the said Grand Inquest in regard to an alleged violation of the statutes of the United States by N. Hayes, Robert Schwarz and others on the part of the United States and that you bring with you and produce at the time and place aforesaid, all stock books,

cash books, ledgers, day books and journals of the business of the Lichtenstein Millinery Company covering the period from July 1, 1905 to July 1, 1909; also all books containing entries concerning or relating to importations of women's wearing apparel and materials thereof from Paris covering the period from July 1, 1905, to July 1, 1909; also all check books, check stub books and all returned checks covering the same period now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit Two Hundred and Fifty Dollars in addition thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New
5 York the 26th day of July, 1909.

Henry A. Wise, United States Attorney, New York, N. Y.

(Sgd.) JOHN A. SHIELDS, *Clerk*.

Endorsed: United States Circuit Court for the Southern District of New York. In the Matter of the Application of William Dreier for a Writ of Habaes Corpus. Petition. Curie, Smith & Maxwell, Attorneys for Petitioner, 32 Broadway, New York City.—U. S. Circuit Court, Southern District of N. Y., Filed Aug. 9, 1909, John A. Shields, Clerk.

6 *Writ of Habeas Corpus.*

United States Circuit Court, Southern District of New York.

In the Matter of the Application *for* WILLIAM DREIER for a Writ of Habeas Corpus.

The President of the United States to the Marshal of the United States for the Southern District of New York, Greeting:

We command you, that you have the body of William Dreier by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said William Dreier shall be called, or charged before a Stated Term of the Circuit Court of the United States for the Southern District of New York to be held in the Post Office Building in the City of New York, Borough of Manhattan, on the 9th day of August, 1909, at 2 o'clock in the afternoon to do and receive what then and there shall be considered concerning said William Dreier and have then and there this Writ.

Witness, Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States on the 9th day of August, 1909.

[SEAL.] JOHN A. SHIELDS, *Clerk*.

So ordered:

C. M. HOUGH,
U. S. J.

7 In obedience to the within writ of habeas corpus, I now produce the body of William Drier, before the United States Circuit Court, who was in my custody under the Committment and Order, a copy of which is hereto annexed.

WILLIAM HENKEL,
U. S. Marshal, S. D. N. Y.

Dated New York, August 9th, 1909.

Paroled—in the custody of W. W. Smith, Esq., until Wednesday Aug. 11, 10 A. M.

C. M. H.

8 *Order for Commitment.*

Circuit Court of the United States, Southern District of New York.

In the Matter of WILLIAM DREIER, a Witness Charged with Contempt of Court by the Grand Jury of the Circuit Court of the United States for the Southern District of New York.

The Grand Jury of the Circuit Court of the United States for the Southern District of New York having on the 5th day of August, 1909, presented to this Court charges of contempt of court on the part of William Dreier, a witness before said Grand Jury, for failure to produce before said Grand Jury, for its examination, in obedience to a subpœna of this court certain books and records of the Lichtenstein Millinery Company, to wit: all books containing entries concerning or relating to importations of women's wearing apparel and materials thereof from Paris covering the period from July 1, 1905, to July 1, 1909; also all check books, check stub books and all returned checks covering the same period, and said witness on that day appearing in person in open court on said charges, and said witness having refused to obey the direction of the Court to produce said books and records, and an order having thereupon been made in writing by this court on August 5th, 1909, wherein it was ordered and adjudged by this court that said William Drier be adjudged to be in contempt of this court for failing to produce said books and records before said Grand Jury in obedience to the order of this court, and that he be committed to the custody of the Marshal until he produces said books and records, or is discharged by due
9 process of law.

This, therefore, is to command the United States Marshal for the Southern District of New York to take and receive said William Drier into his custody in pursuance of the aforesaid order of the court and to detain him until he complies with the aforesaid order of the court by producing before the Grand Jury said books and papers, or is discharged by due process of law.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand nine hundred and nine, and of the

Independence of the United States the one hundred and thirty-fourth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,
United States District Judge Sitting in the Circuit Court.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Aug. 6, 1909, John A. Shields, Clerk.

10 At a Stated Term of the Circuit Court of the United States Held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 16th Day of August, in the Year One Thousand Nine Hundred and Nine.

Present: Honorable Learned Hand, District Judge holding Circuit Court.

In the Matter of WILLIAM DREIER, a Witness Charged with Contempt of Court by the Grand Jury of the Circuit Court of the United States for the Southern District of New York.

On the consent of W. Wickham Smith, Esq., attorney for William Dreier, the witness herein, and Henry A. Wise, United States Attorney for the Southern District of New York, it is

Ordered that the order entered herein on the 5th day of August, in the year one thousand nine hundred and nine, be resettled *nunc pro tunc*, to read as follows:

At a Stated Term of the Circuit Court of the United States Held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 5th Day of August, in the Year One Thousand Nine Hundred and Nine.

Present: Honorable Learned Hand, District Judge holding Circuit Court.

In the Matter of WILLIAM DREIER, a Witness Charged with Contempt of Court by the Grand Jury of the Circuit Court of the United States for the Southern District of New York.

11 The Grand Jury of the Circuit Court of the United States for the Southern District of New York, having on the fifth day of August, 1909, made a presentment to this Court stating that William Dreier, Secretary of the Lichtenstein Millinery Co. had, in the course of an investigation that the Grand Jury was then

making into certain alleged violations of the Customs Laws of the United States by N. Hayes and others, been subpœnaed to produce before the Grand Jury certain books and records of the Lichtenstein Millinery Company relating to the importation of women's wearing apparel and materials thereof from Paris from July 1, 1905 to July 1, 1909, also all check books, check stub books, and all returned checks covering the same period; that on July 27th, 1909, in obedience to said subpœna, William Dreier appeared with counsel and stated that the subpœna would be obeyed, but asked for further time to get the records called for together; that it was arranged with counsel and William Dreier by the United States Attorney that said William Dreier should produce on the following day, July 28th, such of the documents called for as it was possible for him to collect before that time and that the other papers should be produced on August 2nd.

On July 28th, WILLIAM DREIER appeared before the Grand Jury and after being duly sworn testified as follows:

Q. You are the treasurer of the Lichtenstein Millinery Co.
A. No, sir; secretary.
Q. As Secretary you have custody of their books?
A. Yes.
Q. And you have produced here certain books?
A. Yes.
Q. What books have you produced?
A. The ledger, cash book, journal and stub check book and cancelled checks and invoices covering the period of time about 1908 to the present time.

12 Q. You are engaged in trying to get together the other books and papers called for by the subpœna?
A. Yes.
Q. When do you think you will be able to get them together?
A. In a few days. About Monday next I think.

After the witness had withdrawn from the Grand Jury room leaving said papers in the custody of the Grand Jury, for their examination, the said witness and his counsel, a representative of the firm of Choate & Laroeque, stated to the District Attorney that the books which had been produced were in daily use by the corporation, that it was necessary to make daily entries in the same, and that it would be a great embarrassment to the business of the company if they were retained in the Grand Jury room during the Grand Jury examination of the same; that in pursuance of the said request of counsel and his assurance given in the presence of his client that said books and papers would be returned for further examination by the Grand Jury on the following Monday, August 2nd, when the other books called for by the subpœna were to be produced, said William Dreier was, on the afternoon of July 28th, 1909, permitted to withdraw temporarily the said books and records so produced, from the Grand Jury room pending their further examination by the Grand Jury.

On August 2nd said WILLIAM DREIER again appeared before the Grand Jury and testified as follows:

Q. You have been before the Grand Jury before and were subpœnaed to produce certain books and records of your corporation?
A. Yes, sir.
Q. And have you produced them?
A. No sir.
Q. You are the secretary of the corporation and are the custodian of the books of the corporation?
A. Yes, sir.
Q. Why have you not obeyed the direction of the Grand Jury?
A. I refuse to produce them on the ground that they might incriminate the company or myself.
13 Q. That is that the production of the books might incriminate you?
A. Yes.
Q. Do you believe it might?
A. Yes, sir.
Q. Do you believe it might incriminate the company?
A. Yes sir.
Q. Are you acting under advice of counsel?
A. Yes, sir.
Q. Who is your counsel?
A. Mr. Smith of Curie, Smith & Maxwell.
Q. Mr. Wickham Smith?
A. I don't know what his first name is.
Q. You have changed your counsel, then, since you were here before?
A. Yes sir.
Q. And you recall that you were here before and did produce certain of those books, and that your counsel gave assurances to the District Attorney that they would be produced here to-day in your presence?
A. Yes sir.
Q. And you gave similar instructions?
A. I said I would try to bring them.
Q. Aren't you secretary of the company and have the custody of the books?
A. Yes sir.
Q. Well, who could stop you from bringing them?
A. Nobody that I know of.
Q. You say you tried to bring them?
A. Yes, I tried. I refuse to produce them on the ground that they might tend to incriminate the company or myself.
Q. You have decided to refuse to produce them in spite of what your counsel said when he was here before and what you said?
A. Other counsel gave me different advice.

The FOREMAN: The Grand Jury instructs you to produce the books of the corporation next Thursday at half past ten.
The WITNESS: Three days from now, yes.

14 Thereafter, on August 5th, in pursuance of the direction of the Grand Jury, said WILLIAM DREIER again appeared before it and testified as follows:

Q. Who are the directors of the Lichtenstein Millinery Co.?
A. Isaac Lichtenstein, Jacob Lichtenstein and Abraham Lichtenstein.
Q. Never have been any other directors to your knowledge for a good many years?
A. At the incorporation there were different directors in '95.
Q. What is Jacob Lichtenstein?
A. President.
Q. What is Abraham Lichtenstein?
A. Treasurer.
Q. And you are secretary?
A. Yes.
Q. As I understand it, Mr. Dreier, Mr. Jacob Lichtenstein is abroad?
A. No, he got back Tuesday.
Q. Is he at the place of business?
A. I don't know whether he is or not; he was not there when I left.
Q. Is Abraham Lichtenstein there to-day?
—. Yes.
Q. Do you expect Abraham Lichtenstein to be there from time to time?
A. He comes there every day.
Q. Where does he live?
A. Far Rockaway.
Q. What is his address at Far Rockaway?
A. Central Avenue and Oak Street.
Q. Where does Jacob Lichtenstein live?
A. Same place.
Q. You have had nothing to do with the foreign business of the concern, have you—buying?
A. Nothing at all.
Q. Your duties are confined?
A. Office work entirely; credits and things like that.
Q. Obtaining credits for the purchase of merchandise?
A. Granting credit to customers.
Q. Who attends to the custom house work?
A. I make the entries—a broker does it for me, of course.
Q. All you do is to see the invoices and turn them over to the broker?
A. Yes.
15 Q. You receive those yourself?
A. Yes sir. Sometimes I open the mail and sometimes I don't.
Q. Do you have anything to do with any other importations except those which come through the mail?
A. Only that I figure the goods from the bills and tell them the prices.

Q. In order to fix the price at which those goods shall be sold you look at the bills and mark the prices on the boxes, do you?

A. Yes, I tell them the prices.

Q. You have nothing to do with the buying?

A. Nothing at all.

Q. Have you anything to do with the remittances abroad?

A. I always send the money abroad. I always order the cables—buy it.

Q. How do you know how much to buy?

A. Well according to the amount of the account.

Q. Do you receive instructions in regard to that?

A. I do it myself.

Q. You see how much is owing and buy that amount of exchange?

A. That is right.

Q. The consular invoices which you receive are of course always executed before the *counsel* in Paris by your Commissionaire?

A. That is right.

Q. Have you anything to do with the importation of the model gowns?

A. Nothing further than to mark them; that's all.

Q. How about paying for them?

A. I pay on account all the time, sending drafts for 100,000 francs, 50,000 francs.

Q. You pay those drafts through Rosenburg?

A. I pay them generally through the American Express Co.—buy the exchange from them and they cable it direct.

Q. You don't pay the individual model makers from whom
16 the dresses are purchased?

A. No, only send the money to Rosenberg.

Q. You haven't anything to do with the arrangements for shipping these model gowns to this country.

A. Nothing at all.

Q. They are made entirely by Jacob Lichtenstein?

A. When he is in Paris.

Q. You have never entered into any arrangements for their shipment?

A. No sir.

Q. Have you any knowledge of any illicit importations of any of these gowns?

A. No sir.

Q. Or any of your materials?

A. Nothing at all.

Q. You haven't any knowledge of any offense against the customs laws?

A. Nothing that I know of.

Q. You have never taken any part to your knowledge in any offense against the customs laws?

A. Not that I know of.

Q. You don't believe that you have been guilty of the commission of any crime in connection with the importation of any goods?

A. No, nothing at all.

Q. You have been subpœnaed to produce certain books?

A. I haven't produced them on the ground that it might incriminate myself or the company of which I am an officer.

Q. You have testified that you have never committed any offense against the customs laws of the United States in any way?

A. I must refuse to produce the books on that ground.

Q. So far as you know you have never broken any law of the United States?

A. I don't like to answer that question on the same grounds.

Q. Do you desire to change your testimony as to your not having violated any of the customs laws.

A. Yes sir. I refuse to answer on the ground that it might tend to incriminate myself or the company of which I am an officer.

Q. You have been subpœnaed to produce certain books
17 before the Grand Jury?

A. Yes.

Q. Which you requested that you be permitted to take away as being books actually in use by your company?

A. Yes sir.

Q. And that you would hold them subject to the call of the Grand Jury on the following Monday?

A. No sir, I didn't.

Q. Didn't you state you would return them on the following Monday?

A. You told me to bring them back but I didn't say I would.

Q. Didn't you say that those would be returned on Monday?

A. You told me to bring them back, but I didn't say I would. I had full intention of bringing them back but I did not promise to bring them back.

Q. You understood that the Grand Jury wasn't through with them?

A. I presumed that was the case.

Q. Didn't you say that one reason why you wanted to take them was so that you could make certain notations which would make it clearer to what certain accounts related?

A. I offered to do that, but that wasn't the reason why I took them. They were books actually in use and books we were using at the present time.

Q. Your counsel was present at that time?

A. Yes, he was present.

Q. Who was your counsel?

A. Mr. Bayes.

Q. He joined in the request that you might be permitted to take them away temporarily?

A. He spoke to you about that but I didn't hear everything he said to you. I understood that he was going to get them all until he told me afterwards.

Q. You did get them all?

A. Yes sir I think I did.

Q. You had every intention of bringing those back to
18 the Grand Jury?

A. Yes, until I saw those other attorneys.

Q. You had consulted Mr. Bayes in regard to the matter in the first instance?
A. Yes sir.
Q. And took his advice and produced them?
A. Yes sir.
Q. Those books have remained in your custody and still are in your custody as secretary?
A. Yes sir.

And after stating these facts to the Court the Grand Jury having presented charges that said witness, William Dreier, was in contempt of court in refusing to produce said books, records and papers before the Grand Jury, that in the opinion of the Grand Jury the witness was endeavoring to use the plea of privilege as a shield to others, and that as to himself it was made frivolously and in bad faith, and said William Dreier being then present in court and having been asked by the Court as to whether he had brought said books and papers to the Grand Jury room, and having answered that he had not, was directed by the Court to produce said books and papers before the Grand Jury at four o'clock in the afternoon of said August 5th or stand committed for contempt of court; and on the afternoon of said August 5th said Grand Jury having again made further presentment to the Court stating that the witness, WILLIAM DREIER, had appeared before them and testified as follows:

Q. Have you produced the books in obedience to the direction of the Court?
A. I have.
Q. Will you bring them in now?
A. I refuse to produce them on the ground that they will incriminate me.
Q. Where are the books?
A. Right here at the door.
Q. Will you bring them in to the Grand Jury room?

Witness directs them to be brought in.

Q. In obedience to the direction of the Court have you
19 brought into the Grand Jury room the books and papers required by the order of the Court?
A. Yes.
Q. Will you separate from the rest of the books and papers those that you produced before the Grand Jury on July 28th?
A. I didn't keep the record of them.
Q. It may refresh your recollection by reading your testimony of July 28th?
A. I am taking different dates.
Q. Have you separated those books now as directed?
A. Yes.
Q. Are the books nearest the stenographer the books previously in the grand jury room produced by you?
A. Yes.

Q. The rest of the books are the other books that were called for by the subpœna?

A. Yes.

Q. Do you produce these books for examination by the grand jury?

A. I refuse to produce them on the ground it will tend to incriminate me.

Q. You withdraw the ground that it will incriminate the corporation?

A. Only that it will incriminate me.

Q. You have brought back to the grand jury room the books that were here before?

A. I have.

Q. And in addition you have brought the other books which you stated to the grand jury you would try to bring?

A. Yes.

Q. You refuse to permit the grand jury to make any examination of these books?

A. On the ground that it might incriminate me.

And said Grand Jury having presented charges of contempt of Court against said William Dreier for his failure to produce said books and papers for examination before the Grand Jury or any of them, for his refusal to permit the Grand Jury to make an examination of said books and papers or any of them, and said William Dreier having appeared in open Court to answer said charges; after hearing said presentment and said William Dreier and Wickham Smith, Esq., of counsel for said William Dreier, in answer to said charges, and said William Dreier having been directed by the court to produce said books and papers for examination by the Grand Jury and to permit an examination by said Grand Jury of said books and papers, said William Dreier having refused to produce before the Grand Jury for its examination or permit the examination of the books and papers by the Grand Jury or any of them, and due deliberation having been had, it is

Ordered and adjudged by the Court that the said William Dreier be, and he hereby is adjudged to be in contempt of this Court for failure to produce said books and papers before the said Grand Jury for its examination or to permit an examination by said Grand Jury of said books and papers in obedience to the order of this Court,

And it is further ordered and adjudged that he be committed to the custody of the marshal until he produces before the Grand Jury for their examination said books and records, or permits an examination by said Grand Jury of said books and records, or is discharged by due process of law.

LEARNED HAND,
United States Judge.

LEARNED HAND,
United States Judge.

Entry of the foregoing order is hereby consented to.

W. WICKHAM SMITH,
Attorney for William Dreier.
HENRY A. WISE,
United States Attorney for the Southern District of New York.

Dated New York, August 16th, 1909.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Aug. 19, 1909, John A. Shields, Clerk.

21 U. S. Circuit Court, Southern Dist. of New York.

Habeas Corpus.

In Re DREIER.

Memorandum.

The return herein shows that a judgment has been entered in this court declaring the relator in contempt for reasons set forth at length in the judgment.

The writ, as explained by petition and argument raises but one question, viz: whether the judgment is or is not in violation of defendant-relator's rights under the fifth amendment to the National Constitution.

The Court had jurisdiction, both of the defendant and the subject matter,—and the allegation now made is exactly that it erred in not adjudging that Dreier should have been discharged, and not punished.

Since the error alleged consists (if it exists) in violating a constitutional right, it seems clear that Dreier was entitled to his writ and a hearing thereon. Re Neilsen, 131 U. S. 176. And in Hale v. Henkel 201 U. S. 43, an order adjudging a witness in contempt was in effect reviewed, on appeal from an order denying discharge under a Habeas Corpus issuing from the same court and heard by a judge of the same jurisdictional powers as the one who had committed the relator.

Yet as a general rule a habeas cannot be used to fulfill the functions of a writ of error. This rule has generally been announced in cases where either a writ would not lie, or where an appeal in Habeas Corpus proceedings seemed a quicker or cheaper
22 method of review.

It is difficult for me to reconcile the decisions on this point,—but this much is clear, that where a writ of error affords to one imprisoned, a remedy, ample complete and prompt,—it is highly undesirable that one judge should liberate on habeas, a man duly adjudged in contempt, by another judicial officer of identical jurisdiction and sitting in the same court.

The present application demands that I hold (in effect) that

Hand, J. erred in deciding against Dreier's claim of privilege. That error (if committed) can be corrected by writ of error. (Nelson v. U. S. 201 U. S. 92. Alexander v. U. S. 201, U. S. at p. 122,—and see especially Ballman v. Fagin 200 U. S. 186, where the constitutional question was taken up by appeal in habeas, and writ to the judgment.)

This matter needs elucidation,—and the tendency toward using habeas corpus to correct mere error needs further curbing.

The present case as submitted in argument is an illustration of the dangers of "shortcuts" in practice. On writ of error a bill of exceptions must be prepared, and it seemed clear to me on discussion that such bill would be a far fairer and more ample method of presenting the serious question suggested, than the hurried habeas papers.

On the merits of this application, I incline to think that Dreier has waived his privilege (assuming its existence).

In order therefore to present the question of procedure as well as to give Dreier the same standing as Ballman had in 200 U. S. 186, the matter will be disposed of by an order remanding the relator,

on the grounds (1) that this is an endeavor to use the writ
23 as one of error in the same court and (2) that under the circumstances shown he is not entitled to the privilege claimed.

C. M. HOUGH, *J.*

Aug. 11, 1909.

(Endorsed:) U. S. C. C., S. D. N. Y.—In Re Dreier—Mem. on Habeas Corpus.—U. S. Circuit Court, Southern District, N. Y., Filed Aug. 11, 1909, John A. Shields, Clerk.

24 *Order Dismissing Writ of Habeas Corpus.*

At a Stated Term of the Circuit Court of the United States Held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 17th Day of August, in the Year One Thousand Nine Hundred and Nine.

Present: Honorable Charles M. Hough, District Judge holding Circuit Court.

In the Matter of the Application of WILLIAM DREIER for a Writ of Habeas Corpus.

An order having heretofore been made on the 5th day of August, 1909, adjudging William Dreier, Secretary of the Lichtenstein Millinery Company, to be in contempt of this court for failure to produce certain books and papers for examination before the Grand Jury of the Circuit Court of the United States for the Southern District of New York, and committing the said William Dreier to the custody of the Marshal until he should produce the said books before the said Grand Jury for their examination.

And a Writ of Habeas Corpus having thereafter been issued out of this court, directing the marshal to have the body of the said William Dreier before the said court on the 9th day of August, 1909, at 2 o'clock in the afternoon, together with the time and cause of the imprisonment and detention of the said William Dreier,

And due return on the said Writ having been made, and a traverse duly filed thereto and after reading and filing the petition for the writ of habeas corpus and the return thereto, and the com-
25 mit*t*ment and order for committ*t*ment, as resettled, submitted therewith, and the traverse to said returns, and due deliberation having been had,

Now, upon motion of Henry A. Wise, United States Attorney for the Southern District of New York, it is

Ordered, that the said Writ of Habeas Corpus be, and the same is hereby dismissed, and

Further ordered that the said William Dreier be remanded to the custody of the marshal.

C. M. HOUGH,
U. S. D. J.

Notice of settlement of within order is hereby waived.
Dated New York Aug. 16th, 1909.

W. WICKHAM SMITH,
Attorney for Petitioner.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Aug. 18, 1909, John A. Shields, Clerk.

26 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered, that on this 25th day of August, in the year of our Lord one thousand nine hundred and nine before me, John A. Shields, one of the Commissioners duly appointed by the District Court of the United States of America, for the Southern District of New York, in the Secon*e* Circuit, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the provisions of the Acts of Congress in that behalf, personally came William Dreier, of the City and County of New York and the National Surety Company, a New York Corporation and severally acknowledged themselves to owe the United States Five hundred ($500) dollars separately to be levied and made of their respective goods and chattels, lands and tenements, to the use of the said United States, if default shall be made in the condition following, to wit:

Whereas, at the stated term of the Circuit Court of the United States for the Southern District of New York, held on the 5th day of August, 1909, the said William Dreier was committed for Contempt of Court for failure to produce certain books called for by a subpœna for examination and inspection by the Grand Jury of said District and

Whereas, the said Circuit Court did thereupon order the said William Dreier to find sufficient bail, in the sum of Five hundred ($500) Dollars for his appearance before the Grand Jury of the United States of America, for the Southern District of New York, to be holden at the United States Court Building in the City of New York, after the decision by the Supreme Court of the United States on his appeal from said order and committment, and that in
27 default of finding such bail the said William Dreier should stand committed,

Now therefore the condition of this recognizance is such, that if the said William Dreier shall personally appear and surrender himself to the custody of the Marshal of the United States of America, for the Southern District of New York, at the time above mentioned, and then and there answer all such matters and things as shall be objected against him, and abide the order of the Court, and not depart the said Court without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

WILLIAM DREIER. [SEAL.]

Acknowledged before me the day and year first above written.

[SEAL.] JOHN A. SHIELDS,
U. S. Commissioner.

[SEAL.] NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Res. Vice-President.

28 National Surety Company of New York.

Financial Statement, June 30th, 1909.

Wm. B. Joyce, President. David W. Armstrong, Jr., Secretary.

Assets.

Par value.		Market value.
$220,500	United States Government Bonds.....	$224,873.75
941,000	City of New York Bonds.....	890,093.75
30,000	City of Cincinnati, Ohio, "Branch Hospital" Bonds, 3.65%, 1931.....	29,250.00
25,000	City of Richmond, Va., Registered 4%, 1941	25,000.00
10,000	City of Albuquerque, New Mexico, 4½%, 1929	10,687.50
10,000	Atchison, Topeka & Santa Fe Railway, 4%, 1995	10,125.00
20,000	Atchison, Topeka & Santa Fe Railway, 4%, 1958	19,000.00
20,000	Atlantic Coast Lines R. R. 4%, 1952....	19,200.00
20,000	Baltimore & Ohio R. R. "Prior Liens," 3½%, 1925	18,850.00

20,000	Baltimore & Ohio R. R. "Gen'l Mtge." 4%, 1948	20,125.00
15,000	Central R. R. of N. J. 5%, 1987	19,068.75
30,000	Central Pacific Railway "Rfdg. Mtge." 4%, 1949	29,175.00
10,000	Chesapeake & Ohio R. R. 5%, 1939	11,475.00
10,000	Chicago & Alton R. R. Ref'd, 3%, 1949	7,825.00
20,000	Chicago & Eastern Illinois R. R. 4%, 1955	17,700.00
10,000	Chicago, Rock Island & Pacific R. R. "Gen'l Mtge." 4%, 1988	10,075.00
10,000	Chicago & Indiana Southern R. R. 4%, 1956	9,600.00
9,000	Chicago & Western Indiana R. R. 6%, 1932	10,080.00
10,000	Chicago, Burlington & Quincy R. R. "Ill. Div." 4%, 1949	10,112.50
10,000	Chicago, Burlington & Quincy R. R. "Gen'l Mtge." 4%, 1958	10,000.00
10,000	Cleveland, Cincinnati, Chicago & St. Louis R. R. 4%, 1993	9,762.50
20,000	Colorado & Southern Ry. Co. "Refdg. & Extension Mtge." 4½%, 1935	19,800.00
10,000	Delaware & Hudson R. R. "Refdg." 4%, 1943	10,175.00
10,000	Delaware & Hudson R. R. "Cons." 4%, 1916	10,600.00
10,000	Duluth, Misaba & Northern Ry. "Gen'l Mtge." 1941	10,750.00
10,000	Iowa, Minn. & Northwestern Ry. Co. 3½%, 1935	9,200.00
10,000	Kentucky Central R. R. 4%, 1987	9,775.00
10,000	Lake Shore & Michigan Southern R. R. 4%, 1931	9,525.00
15,000	Lehigh Valley R. R. "Gen'l Mtge." 4%, 2003	14,625.00
10,000	Louisville & Nashville R. R. 4%, 1940	10,112.50
25,000	Manhattan Railway Company, 4%, 1990	25,062.50
20,000	Michigan Central Railway Deb. 4%, 1929	18,850.00
20,000	Missouri, Kansas & Oklahoma R. R. 5%, 1942	21,900.00
15,000	Missouri, Kansas & Texas R. R. 4%, 1990	15,037.50
20,000	Missouri, Kansas & Texas R. R. 100 yr. Refdg. Mtge. 4%, 2004	17,300.00
10,000	New York Central Lines "Equipment," 5%, 1919	10,675.00
10,000	New York Central & Hudson River R. R. 4%, 1934	9,600.00
25,000	New York, New Haven & Hartford R. R. "Deb." 4%, 1956	24,250.00
20,000	Northern Pacific & Great Northern R. R. "Joint." 4%, 1921	19,675.00

20,000	Oregon R. R. & Navigation Co. 4%, 1946.	19,675.00
10,000	Pennsylvania Company 4%, 1931	9,875.00
10,000	Pennsylvania R. R. "Cons." 3½%, 1915.	9,675.00
5,000	Pennsylvania R. R. "Consols." 4%, 1948.	5,225.00
10,000	Pittsburg, Cincinnati, Chicago & St. Louis R. R. 4%, 1957.....	10,050.00
6,000	Southern Pacific Co., 20 yrs. Convertible Gold 4%, 1929	6,180.00
10,000	Union Pacific R. R. 4%, 1927.....	10,400.00
25,000	Union Pacific R. R. "1st Lien and Rfdg." 4%, 2008	24,937.50
25,000	United States Steel Corporation 5%, 1963	26,375.00
100 Shares	Atchison, Topeka & Santa Fe Rwy. Preferred	10,400.00
100 "	Atlanta & Charlotte Air Line R. R. (7% Guar. by Southern Ry.).....	19,500.00
100 "	Chicago, Milwaukee & St. Paul Ry. (Common)	15,400.00
200 "	Cleveland & Pittsburg R. R. (7% Guar. by Penn. R. R.)	17,800.00
100 "	Delaware & Hudson Co.	19,412.50
100 "	Detroit, Hillsdale & S. W. R. (4% Guar. by L. S. & M. S. R. R.).....	10,150.00
100 "	Great Northern Ry. Preferred 7%.....	14,887.50
100 "	Illinois Central R. R. "Leased Lines." (4% Guar. by Illinois Central).....	10,150.00
100 "	Illinois Central R. R. Co.	14,875.00
400 "	Kansas City, Ft. Scott & Memphis R. R. (4% Guar. by St. L. & San Fran. R. R.)	31,400.00
300 "	Manhattan Railway Co. (7% Guar. by Interborough Rapid Transit)	43,500.00
100 "	Missouri, Kansas & Texas R. R. Preferred	7,325.00
400 "	Morris & Essex (7% Guar. by Delaware L. & W. R. R.).....	36,800.00
400 "	Nashville & Decatur R. R. (7½% Guar. by L. & N. R. R.).....	18,900.00
100 "	New York, Lackawanna & Western R. R. (5% Guar. by D. L. & W. R. R.).....	12,825.00
100 "	Northern Pacific Railway	15,200.00
200 "	Pennsylvania R. R.	13,675.00
200 "	Pittsburg, McKeesport & Youghiogheny R. R.	13,150.00
100 "	Pittsburg, Ft. Wayne & Chicago Ry. (7% Guar. by Penn. R. R.).....	17,650.00
100 "	Rome, Watertown & Ogdensburg R. R. (5% Guar. by N. Y. Central R. R.)...	12,750.00
400 "	Lehigh Valley R. R. "Common".....	32,050.00
200 "	Southern Pacific R. R. Preferred.....	25,975.00
400 "	Union Pacific R. R. Preferred.....	40,600.00
500 "	Wisconsin Central Ry. Preferred (Soo Leased Lines)	45,000.00

Real Estate	129,748.48
Mortgage Loans (First Liens)	20,481.30
Premiums in Course of Collection, written since April 1, 1909, (not including $128,471.83 written prior thereto)	369,131.66
Accounts Receivable	22,152.92
Accrued Interest	18,722.22
Cash in Bank and Offices	450,877.03
Total	$3,311,872.36

Liabilities.

Reserve for Re-Insurance	1,174,316.54
Reserve for Contingent Claims	487,244.80
Other Liabilities, including commissions on unpaid premiums	147,157.70
Capital Stock	750,000.00
Surplus	753,153.32
Total	$3,311,872.36

—— ——,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

William A. Thompson, of New York, being duly sworn, deposes and says that he is Assistant Secretary of the National Surety Company, of New York, and that the above and foregoing is a full, true and correct statement of the financial condition of said Company on the Thirtieth day of June, A. D., 1909.

—— ——.

Subscribed in my presence and sworn to before me this — day of —— A. D. 1909.

—— ——.

29 Endorsed: U. S. Circuit Court. The United States of America vs. William Dreier. Recognizance to Appear and Answer After Determination of Appeal. Approved as to form and sufficiency: Henry A. Wise, U. S. Attorney. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the U. S. of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. C. M. Hough, U. S. Dist. Judge. 8/26/09. U. S. Circuit Court, Southern District of N. Y., Filed Aug. 25, 1909, John A. Shields, Clerk.

30 *Assignment of Errors.*

United States Circuit Court, Southern District of New York.

WILLIAM DREIER, Appellant,
against
THE UNITED STATES, Respondent.

Assignment of Errors.

The Appellant herein assigns the following errors in the proceedings in the Circuit Court. The Circuit Court erred—

1. In holding that the proceeding by writ of Habeas Corpus was to endeavor to use the writ as one of error in the same court.

2. In holding that under the circumstances shown the appellant was not entitled to the privilege claim.

3. In holding that the appellant was not entitled to claim of privilege in producing books or documents tending to incriminate himself under the Fourth Amendment of the Constitution of the United States.

4. In holding that the appellant had waived whatever privilege he had.

5. In holding that any answers the appellant might have made to questions asked by the Grand Jury or any act of his in producing any books or documents before the Grand Jury in any way estops said appellant from claiming his privilege at any time after further consideration or consultation with counsel.

6. In holding that anything but a clear, express and un-
31 equivocal waiver of his privilege against producing any books or documents before the Grand Jury could estop said appellant from pleading his privilege or refusing to permit the inspection of books or documents in his custody at any time.

7. In dismissing the Writ of Habeas Corpus and not ordering the discharge from custody of the appellant.

Dated New York, August 20th, 1909.

W. WICKHAM SMITH,
Attorney for Appellant, 32 Broadway, New York City.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Aug. 23, 1909, John A. Shields, Clerk.

32 *Petition and Allowance of Appeal.*

United States Circuit Court, Southern District of New York.

WILLIAM DREIER, Appellant,
against
WILLIAM HENKEL.

The above named William Dreier conceiving himself aggrieved by a decision entered herein upon the 17th day of August, 1909,

dismissing a Writ of Habeas Corpus does hereby appeal from the said decision to the Supreme Court of the United States and he prays that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decision was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, August 20th, 1909.

W. WICKHAM SMITH,
Attorney for Appellant, No. 32 Broadway, New York City.

It is hereby certified that the questions involved in this case and described in the annexed appeal are in the opinion of this Court of such importance as to require a review of the decision of
33 this Court by the Supreme Court of the United States and the appeal from said decision to said Supreme Court of the United States is therefore allowed.

Dated New York August 20th. 1909.

C. M. HOUGH,
United States District Judge Holding U. S. Circuit Court.

(Endorsed:) A copy of the within paper has been this day received at this office. Aug. 25, 1909. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y., Filed Aug. 23, 1909, John A. Shields, Clerk.

34 *Bond for Costs.*

Know all men by these presents, That I, Henry B. J. Craig, am held and firmly bound unto the United States of America in the sum of Two hundred and fifty ($250.00) dollars to be paid to the said United States of America.

For the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with my seal and dated the 14th day of August in the year of Our Lord one thousand nine hundred and nine.

Whereas William Dreier -as applied to the Supreme Court of the United States by Writ of Error for a review of the questions of law and fact involved in a certain decision rendered on the 5th day of August, 1909, and filed in the office of the Clerk of the United States Circuit Court for the Southern District of New York on that day,

Now, therefore, the condition of this obligation is such, that if the above named William Dreier shall prosecute said proceedings with effect and pay all costs which shall be awarded against him or if he shall fail to make said proceeding good then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

HENRY B. J. CRAIG. [SEAL.]

Sealed and delivered and taken and acknowledged this 14th day of August, 1909, before me

ELY NEUMANN,
Notary Public, New York County.

35 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Henry B. J. Craig being duly sworn, deposes and says that he resides in the Southern District of New York in the City of New York; and that he is worth the sum of Five hundred ($500.00) Dollars over and above all his just debts and liabilities.

HENRY B. J. CRAIG.

Sworn to before me this 14th day of August, 1909.

[SEAL.] ELY NEUMANN,
Notary Public, New York County.

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, August 20, 1909.

C. M. HOUGH,
U. S. District Judge Holding Circuit Court.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Aug. 23, 1909, John A. Shields, Clerk.

36 *Stipulation.*

United States Circuit Court, Southern District of New York.

WILLIAM DREIER, Appellant,
vs.
WILLIAM HENKEL, Respondent.

It is hereby stipulated that the foregoing record comprises and includes all the proceedings in the cause above entitled.

Dated New York, October 23, 1909.

W. WICKHAM SMITH,
Attorney for Appellant.
HENRY A. WISE,
Attorney for Respondent.

37 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To William Henkel:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington on the 11th day of September, 1909, pursuant to an appeal dismissing a Writ of Habeas Corpus filed August 17th, 1909, in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York to show cause, if any there be, why the decision of the United States Circuit Court of the Southern District of New York in the said appeal mentioned, should not be reversed,

modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of New York in the Southern District of New York on the 20th day of August, 1909.

C. M. HOUGH,
U. S. District Judge Holding U. S. Circuit Court.

38 [Endorsed:] A copy of the within paper has been this day received at this office. Aug. 25, 1909. Henry A. Wise, U. S. Attorney.

W. A. 2972. 2/188. Supreme Court of the United States. William Dreier, Appellant, vs. William Henkel, Respondent. (Original.) Citation. (On appeal in Habeas Corpus.) W. Wickham Smith, Att'y for Appellant, 32 Broadway, New York City. U. S. Circuit Court, Southern District N. Y. Filed Aug. 30, 1909. John A. Shields, clerk.

39 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to thirty-eight inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled William Dreier, Appellant, against William Henkel, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of October in the year of our Lord One Thousand Nine Hundred and nine and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. William Dreier, Appellant, vs. William Henkel, Respondent. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 21,877. S. New York C. C. U. S. Term No. 661. William Dreier, appellant, vs. William Henkel, U. S. marshal for the southern district of New York. Filed November 1st, 1909. File No. 21,887.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

WILLIAM DREIER, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 660.
WILLIAM DREIER, APPELLANT, v. WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York.	No. 661.

MOTION TO ADVANCE.

No. 660.

Plaintiff in error is secretary of the Lichtenstein Millinery Company of New York City, a corporation engaged in the millinery business, including the importation of millinery materials. While testifying in the course of an investigation made by the grand jury of the Circuit Court of the United States, Southern District of New York, into certain alleged violations of the customs laws of the United States, he was subpœnaed to produce before that body certain books and records of the company relating to the importation of materials used in its business. Only some of the documents were produced; later, upon represen-

tations made that they were needed for the proper transaction of the company's business, these were permitted to be withdrawn temporarily. Plaintiff in error finally returned them, and also produced the rest of the documents called for by the subpœna, but refused to permit their examination by the grand jury, on the ground that it might incriminate him. Thereupon the grand jury presented to the court charges of contempt because of such refusal. To review the action of the court in adjudging him guilty of contempt, this writ of error was sued out. The plaintiff in error is now at large on bail pending the decision of this court.

No. 661.

Immediately after the commitment of Dreier growing out of the acts set forth above, application was made for a writ of habeas corpus on the ground that he was being restrained of his liberty without due process of law, and that his punishment for contempt of court was without warrant in law. The writ issued; but, after hearing, was dismissed, and this appeal taken.

In accordance with the provision of rule 26, section 3, the Solicitor-General moves the court to advance the cases on the docket for hearing on a day convenient to the court during the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1910.

O

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1909.

WILLIAM DREIER, Plaintiff-in-Error, vs. THE UNITED STATES, Defendant-in-Error.	No. 358.
WILLIAM DREIER, Appellant, vs. WILLIAM HENKEL, Marshal for the Southern District of New York, Appellee.	No. 359.

BRIEF FOR PLAINTIFF IN ERROR (IN 358) AND APPELLANT (IN 359).

NOTE: These two cases were assigned to be argued together. They involve the same question, but the record in 359 is fuller and more complete than that in 358 and, therefore, in referring to the record in connection with the statement of facts it will be understood that the references are all to the record in number 359.

Statement of the Case.

The appellant is the secretary of the Lichtenstein Millinery Company, a domestic corporation doing business in the Southern District of New York, and whose business is millinery and dresses, including the importation of the same (fol. 1). As secretary of the Lichtenstein Millinery Company, the appellant makes oath and affidavit to the Custom House entries upon which goods from foreign countries are entered at the Custom House at New York (fols. 2–14). On or about the 27th day of July, 1909, appellant was served with a subpœna to appear before the Grand Jury of the Southern District of New York "on the 27th day of July, 1909, at 10:30 o'clock in the forenoon, to testify before the said Grand Inquest in regard to an alleged violation of the statutes of the United States by N. Hayes, Robert Schwarz and others on the part of the United States, and that you bring with you and produce at the time and place aforesaid, all stock books, cash books, ledgers, day books and journals of the business of the Lichtenstein Millinery Company covering the period from July 1, 1905, to July 1, 1909; also all books containing entries concerning or relating to importation of women's wearing apparel and materials thereof from Paris covering the period from July 1, 1905, to July 1, 1909; also all check books, check stub books and all returned checks covering the same period now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises" (fols. 1 and 4). The witness appeared and gave some testimony and produced certain books and stated that he had not gotten them all together, but would do so in a few days. He was allowed to temporarily withdraw the books for reasons stated (fol. 12). He was again summoned before the Grand Jury on the 2nd day of August, and he appeared and refused to produce the books on the ground that they might incriminate him.

He stated that between his first and second appearances he had changed counsel and that he was acting under the advice of his new counsel. He was then ordered by the foreman of the Grand Jury to produce the books on the 5th of August. He appeared on the 5th of August and again refused to produce the books on the same ground (fol. 16).

The Grand Jury then reported the matter to the Court, the appellant being present. He informed the Court, in answer to a question, that he had not brought the books. He was directed to produce the books and papers before the Grand Jury at four o'clock of the same day. He did, in compliance with said order, physically produce the books, whereupon the following took place:

> "Q. Do you produce these books for examination by the Grand Jury?
> A. I refuse to produce them on the ground it will tend to incriminate me.
> Q. You withdraw the ground that it will incriminate the corporation?
> A. Only that it will incriminate me.
> Q. You have brought back to the Grand Jury room the books that were here before?
> A. I have.
> Q. And in addition you have brought the other books which you stated to the Grand Jury you would try to bring?
> A. Yes.
> Q. You refuse to permit the Grand Jury to make any examination of these books?
> A. On the ground that it might incriminate me" (fol. 19).

The Grand Jury then presented charges of contempt and the appellant appeared in open Court to answer to the charges. After hearing the presentment and argument of counsel, the Court ordered him to produce the books and papers for examination by the Grand Jury and to permit an examination by the Grand Jury of said books and papers. Appellant refused to comply with this order and was thereupon adjudged in contempt and committed to the cus

tody of the Marshal until he produced before the Grand Jury for their examination said books and records or permitted an examination by said Grand Jury of said books and records.

Appellant then sued out a writ of *habeas corpus.* Being produced before the Court by the Marshal, and argument having been had, the writ was dismissed and appellant remanded to the custody of the Marshal (pp. 13-14-15). The Judge before whom the hearing on the writ of *habeas corpus* was held filed an opinion (pp. 13-14-15) From the order dismissing the writ and remanding him to the custody of the Marshal appellant appeals to this Court.

The direct appeal from the decision of the Circuit Court adjudging the plaintiff in error in 358 in contempt was taken because of the suggestion in the opinion of Judge Hough in 359 that the proper remedy was by writ of error from the order of committal and not by *habeas corpus.* It is important that the question here involved should be decided upon the merits and not go off on technical grounds, and, therefore, Dreier pursued both remedies.

Provisions of law to be construed.

U. S. Constitution, 5th Amendment:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

Section 860, U. S. Revised Statutes:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: PROVIDED, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

Section 9 of the Customs Administrative Act of June 10, 1890:

> "That if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act of omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise, to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offence a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the Court.'

The precise questions involved.

Two questions are involved in these appeals.

1.

Had Dreier the right or privilege at the time he was summoned before the Grand Jury to refuse to produce the books called for by them or to give testimony on the ground that the testimony might tend to incriminate him.

2

If he had such right was it waived by reason of anything done or said by him.

POINTS.

POINT I.

Dreier had an absolute right to refuse to produce books for the consideration of the Grand Jury or to give testimony upon the ground that to do so might tend to incriminate him.

In Burr's trial, 244, Chief Justice Marshall in the Circuit Court used the following language:

> "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the Court can demand no other testimony of the fact. According to their statement (the counsel for the United States), a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuses himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he

> is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the Court can never know. It would seem, then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

In Counselman *vs.* Hitchcock, 142 U. S., 547, it was decided that an investigation before a Grand Jury was a criminal case within the meaning of the expression as used in the fifth amendment; that a witness might assert his privilege in any investigation before a Grand Jury, whether of his own case or that of another; and that the provisions of Section 860, Revised Statutes, were not co-extensive with that of the Constitution, and that said statute would furnish him no adequate protection against subsequent prosecution.

In the case at bar, as pointed out in the statement of the case, there is nothing in the subpœna or in any of the facts or proceedings set forth by the Grand Jury to show how the testimony requested of Dreier would in any way throw any light on the matters under investigation before the Grand Jury. The subpœna called upon him "to testify before the said grand inquest in regard to an alleged violation of the statutes of the United States by N. H. Hayes, Robert Schwarz and others." At no stage of the proceedings was it ever indicated in any way what the matter was that was under investigation, or what possible connection, if any, Dreier or the books of the Lichtenstein Millinery Company had. It did appear by the allegations of the petition for the writ of *habeas corpus*, which have never been traversed, and must, therefore, be assumed to be true, that Dreier was the secretary

of the Lichtenstein Millinery Company and that it was the practice for him to make oath and affidavit to the Custom House entries upon which goods from foreign countries were entered at the Custom House at New York and that the said books contained the purchase price at which sai l merchandise was purchased abroad. Of course, the invoices used on which to make entry at the Custom House were in the custody of the Government and if the books of the concern should show a higher price paid for goods than that which was set forth in the consular invoice, Dreier, who made the entries at the Custom House, might under Section 9 of Customs Administrative Act be criminally liable for making false declarations. This fact he pointed out to the Grand Jury (see p. 8, fol. 14) when he stated to the Grand Jury that he made the Custom House entries. He was not called upon to show the Grand Jury how any testimony he gave or books he produced might tend to incriminate him nor was he obliged to say that to the District Attorney. He had a right to assert his privilege. It will be noted that the subpœna was not addressed to the corporation to secure the mere physical production of the books. It was addressed to him personally and he personally was called upon not only to produce the books, but to testify.

The witness could no more be compelled to produce books for the examination of the Grand Jury than to testify orally before them.

Ballman *vs.* Fagin, 200 U. S., 186.

In Boyd *vs.* United States, 116 U. S., 616, this Court went so far as to hold that an express statute requiring the production of books in customs cases was in violation of the 5th amendment of the Constitution, and this in a case which was only *quasi* criminal, namely an action for the forfeiture of imported merchandise.

The authorities, both State and Federal, upholding the privilege of a witness to refuse to answer

questions that he claims would tend to incriminate him, are innumerable. Among them are the following (in addition to those already cited):

Ex parte Chapman, 153 Fed. Rep., 271.
In re Kanter, 117 Fed Rep., 356.
In re Hess, 184 Fed. Rep., 109.
Foot *v.* Buchanan, 113 Fed. Rep., 156.

The same rule has been applied in bankruptcy cases.

In re Nachman, 114 Fed. Rep., 995.
In re Smith, 112 Fed. Rep., 509.
In re Shera, 114 Fed. Rep., 207.
Edelstein *vs.* United States, 149 Fed. Rep., 636, at 642.
United States *vs.* Goldstein, 132 Fed. Rep., 789.

A witness who claims privilege is not required to admit that he is guilty. The protection of the Constitution is for the innocent as well as for the guilty.

People *v.* Forbes, 143 N. Y., 219.
Lamsen *v.* Boyden, 160 Ill., 613.
Emery's case, 107 Mass., 172.

POINT II.

There was no waiver by the defendant of his right to refuse to produce books or give testimony.

> "There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights."
>
> American & English Encyclopedia of Law, 2nd Ed., Vol. 29, p. 1093.

Where a witness has testified to certain facts having an apparent tendency to incriminate him and a question is asked an affirmative answer to which, in connection with the other facts testified to, would furnish criminating evidence, witness may assert his privilege.

Wallace *vs.* State, 41 Fla., 547.

It is the duty of the Court when the witness is brought before it and shown that his answer would incriminate him to entertain the witness's objection notwithstanding he had stated to the Grand Jury that his answer would not incriminate him.

Ex parte Wilson, 47 S. W., 996.
See also Lamsen *v.* Boyden, 160 Ill., 613.
Blum *v.* State, 94 Md., 375.
Wilson *vs.* State, 57 S. W., 916.

There was certainly no waiver by Dreier of his rights. When he was first called before the Grand Jury he was not aware of them, and although he had counsel, it would seem that the counsel must have been unaware of the provisions of Section 9 of the Customs Administrative Act. When he subsequently appeared before them he was acting under the advice of new counsel. The fact that he had produced some of the books on the first occasion could not prevent him from asserting his privilege at a subsequent session, even though at that session he produced all the books including the ones that he had formerly produced. The sole object in producing the books under the order of the Court was to show that the witness was acting in good faith and that he had not destroyed or removed the books. If the Grand Jury had examined any of the books and he had assisted in the examination and given any testimony it might be claimed that he could not withhold part of an explanation after he had given part of it, but nothing of the kind had happened. The Grand Jury had not examined

the books, nor had he given any testimony concerning their contents. As soon as he had an opportunity to consider his position he refused to allow the Grand Jury to examine the books and thereafter steadily persisted in such refusal. In so doing, he was acting strictly within his rights as laid down by this and other courts. It was entirely plain that the witness was acting in good faith. He was not trying to shield the corporation, but to shield himself, as he was the person who made the Custom House entries. The rights of persons summoned before an inquisitorial tribunal like the Grand Jury to avail themselves of their constitutional rights should be strictly guarded in their favor, and the courts should not encourage any attempts to spell out implied waivers.

POINT III.

The order of the District Court dismissing the writ of habeas corpus and remanding the petitioner to the custody of the marshal should be reversed and the order of the District Court committing him for contempt should also be reversed against the respondent in Case 35[illegible].

Dated Washington, October 8th, 1910.

W. WICKHAM SMITH,
JOHN K. MAXWELL,
Attorneys for Appellant and Plaintiff in Error, Dreier.

W. WICKHAM SMITH,
Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM DREIER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 358.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM DREIER, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York. } No. 359.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR UNITED STATES.

STATEMENT OF THE CASE.

One of these cases is a writ of error issued by this court to the Circuit Court of the United States for the Southern District of New York upon a judgment committing the plaintiff in error for contempt; the other is an appeal from the Circuit Court for the same district upon a judgment dismissing the writ of habeas corpus.

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The plaintiff in error was the secretary of the Lichtenstein Millinery Company (a corporation under the laws of the State of New York, engaged in the importation of dresses and millinery) and had been subpœnaed to produce certain books and records of said company before the federal grand jury for its examination. On the 28th day of July, 1909, said plaintiff in error appeared before the grand jury and produced certain of the documents called for in the subpœna and stated that he was engaged in collecting the others and would have them ready on or about August 2. After the witness had withdrawn from the grand jury room, leaving said documents in the custody of the grand jury for their examination, his counsel stated to the district attorney that the books which had been produced were in daily use by the corporation; that it was necessary to make daily entries in the same, and that it would be a great embarrassment to the business of the company if they were retained in the grand jury room. Upon the assurance of said counsel, given in the presence of his client, that said papers, books, and records would be returned to the grand jury on August 2, when the other books called for in the subpœna were to be produced, the plaintiff in error was permitted to withdraw temporarily the said books and records so produced, pending their further examination by the grand jury. (Record, pp. 3, 4.)

On August 2 the said plaintiff in error again appeared before the grand jury and at that time refused to produce the books he had been permitted

to temporarily withdraw, together with the other books called for by the subpœna, and testified that he had changed his counsel since being before the grand jury before; and disregarding the agreement of previous counsel, refused to produce any of the books called for in the subpœna. At that time the plaintiff in error stated that the production of the books might incriminate himself and the company, and that he was acting under advice of counsel. (Record, pp. 4, 5.)

Thereupon the foreman of the grand jury directed the plaintiff in error to produce the books of the corporation at 10.30 a. m. three days later, to wit, August 5, 1909. (Record, p. 5.)

Thereupon, on August 5, in pursuance of the direction of the grand jury, the plaintiff in error again appeared before said grand jury and refused to produce any of the books or papers called for in the subpœna or any of the books or papers that had already been in the custody of the grand jury and had been temporarily withdrawn. At that time plaintiff in error refused to produce the books on the ground that it might incriminate himself or the company of which he was an officer. The grand jury then presented to the court charges that said witness was in contempt of court in refusing to produce said books and records; that in the opinion of the grand jury the witness was endeavoring to use the plea of privilege as a shield to others, and that as to himself it was made frivolously and in bad faith.

The plaintiff in error, being at that time present in court, and having been asked by the court whether he had brought said books and papers to the grand-jury room, and having answered that he had not, was directed by the court to produce said books and papers belore the grand jury at 4 o'clock in the afternoon of said August 5, or stand committed for contempt of court.

Thereafter, at said hour on August 5, plaintiff in error appeared before the grand jury and refused to produce any of the books called for in the subpœna, or any of the books in the custody of the grand jury which had been temporarily withdrawn by said plaintiff in error, basing said refusal on the ground that it would tend to criminate him.

At that time the books were brought into the grand jury room at the direction of the plaintiff in error, who separated those which he had produced before the grand jury on July 28, and which had been temporarily withdrawn by said plaintiff, from the other books called for in the subpœna, but refused to permit the grand jury to make any examination of the books on the ground that said books might incriminate him. Whereupon the grand jury made further presentment and charges against the said plaintiff in error for his failure to produce said books and papers for examination and for his refusal to permit the grand jury to make an examination of said books or papers, or any of them.

The plaintiff in error having appeared in open court to answer all of said presentments and charges, upon

hearing, was ordered and adjudged to be in contempt of court and committed to the custody of the marshal until he should comply with the order of the court.

The grand jury proceedings were being conducted under the direction of one of the United States district judges for the Southern District of New York, who was at that time acting as circuit judge, and who issued the order and committed the witness to the custody of the United States marshal for contempt of court.

On a writ of habeas corpus the witness was taken before another United States district judge, acting as circuit judge, who, upon hearing, dismissed said writ and remanded the witness to custody.

Appeal was taken to this court from the order dismissing the writ of habeas corpus and a writ of error was also obtained upon the judgment committing the plaintiff in error for contempt.

ARGUMENT.

I.

THE ORDER OF THE COURT THAT THE WITNESS SHOULD PRODUCE THE BOOKS AND PAPERS DID NOT INFRINGE THE FOURTH AMENDMENT TO THE CONSTITUTION.

It is contended in the assignment of errors that the witness was privileged in producing the books and documents by the fourth amendment to the Constitution of the United States. That amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against

> unreasonable searches and seizures shall not be violated and no warrant shall issue except upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

It will surely not be contended at this day that the search and seizure clause of the fourth amendment interferes with the power of the courts to compel the production of documentary evidence through a subpœna duces tecum.

When the judicial power is proceeding in the ordinary way through the writ of subpœna duces tecum to compel the production of documentary evidence, the fourth amendment can rarely be invoked as a privilege. That writ has come down to us through centuries, and without it the administration of justice would be impossible.

Summers v. *Moseley*, 2 Cr. & M., 477;
Wertheim v. *Continental R. & T. Co.*, 15 F. R., 718;
Amey v. *Long*, 9 East, 473;
Bull v. *Loveland*, 10 Pick., 9;
United States Express Co. v. *Henderson*, 69 Iowa, 40; and
Greenleaf on Evidence, 469a.

This court seems to have settled the question in—

Boyd v. *United States*, 116 U. S., 616;
Interstate Commerce Commission v. *Baird*, 194 U. S., 25; and
Hale v. *Henkel*, 201 U. S., 43.

The prevailing opinion in the Boyd case was that to compel the production of the books and papers would be equivalent to compelling the production of evidence to be used against the defendant in a criminal prosecution, and that in effect would be an unreasonable search and seizure within the meaning of the fourth amendment and would be in violation of the fifth amendment in that it compelled a person to be a witness against himself in a criminal case. It is very plain from the language of the court in that case that the opinion rested principally upon the immunity which every person has under the Constitution from producing evidence which may tend to incriminate him. *It should be borne in mind that in that case the statute which compelled the production of the papers provided that if they were not produced they should be conclusively deemed to be incriminatory;* to produce the books and papers was to confess the crime.

In the Baird case subpœnas duces tecum were served upon the parties, requiring them to produce all contracts for the purchase and transportation of anthracite coal entered into by them during a period of over two years with "any producers of anthracite coal or owners or operators of anthracite coal mines." It was contended there that the demand of the subpœna was in violation of the fourth amendment, but the court said that "testimony given under such circumstances presents scarcely a suggestion of an unreasonable search and seizure." The court held that since the individual was given immunity from crim-

inal prosecution it was not an unreasonable search and seizure. *No weight was given to the fact that the books and papers called for were the property of the corporation of which the witnesses were officers, even though the proceeding would in all probability have resulted in the incrimination of those corporations.*

In the Hale case the court applied the fourth amendment to the case of a corporation and the duty of an officer when examined before a grand jury, and held that an order for the production of books and papers may constitute an unreasonable search and seizure within the fourth amendment if it is too sweeping in its terms to be regarded as reasonable.

We come, then, to this, that an order compelling the production of books and papers will constitute an unreasonable search and seizure if it is so sweeping as to go beyond the necessities of the case and operate to arbitrarily and unnecessarily interfere with a man's business or private relations. It is also an unreasonable search and seizure if it amounts to compelling a witness to produce evidence tending to incriminate him. In the case at bar it is not contended that the subpœna was too broad, and we, therefore, have before us the question, Could the production of the books and papers have incriminated the witness?

II.

THE BOOKS BELONGED TO THE CORPORATION, AND ITS OFFICER HAVING CUSTODY OF THEM WAS BOUND TO PRODUCE THEM UNDER A SUBPŒNA DUCES TECUM.

A corporation can be compelled to furnish information upon the order of a proper judicial tribunal concerning the conduct of its business even though such information might be incriminatory. This is settled by—

Hale v. *Henkel*, 201 U. S., 43;

Hammond Packing Co. v. *Arkansas*, 212 U. S., 322, 348, 349;

Consolidated Rendering Co. v. *Vermont*, 207 U. S., 541, 553; and

American Tobacco Co. v. *Werckmeister*, 207 U. S., 284, 302.

The books and papers asked for by the order of the court were not the private documents of the witness Dreier, but were in fact the books of the corporation, and the order for their production was simply an order upon the officer of the corporation having custody of them to produce them for examination. The witness was not asked in the subpœna to testify concerning them, but was only ordered to surrender them up to the grand jury for its examination. It was in fact an order upon the corporation for the production of its books, directed to the proper officer.

It was said in *Hale* v. *Henkel*, at page 74:

> Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public.

> It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

A corporation acts only through its officers. Its books can only be produced through an individual. When it responds to a notice or an order issued to it it must do so through the individual action of its officers and agents. The question here is not whether

the officer of the corporation was compelled to testify regarding facts which would incriminate him, but it is whether a corporation is compelled to surrender its books for the examination of a grand jury.

The witness in this case was not asked to give testimony against himself; he was not asked to produce his own private papers; he was asked as an officer of a corporation to produce documents belonging to the corporation.

A corporation is supposed to be created by the State for the public good, and it holds its charter subject to the laws of the State. It must answer to the State and to the Federal Government whenever it abuses its privileges or violates any law. All process is served upon it through its officers and it must show its hand when charged with an abuse of any of its franchises through the action of its individual officers appearing for it.

III.

IT MUST APPEAR TO THE COURT THAT THE EVIDENCE SOUGHT COULD REASONABLY HAVE A TENDENCY TO CRIMINATE THE WITNESS AND IT IS THEN FOR THE WITNESS TO SAY THAT SUCH EVIDENCE WOULD HAVE SUCH A TENDENCY.

It may be conceded that a witness can not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. There are many links that make up a chain of evidence to convict an individual, and a witness can not be compelled to furnish any one of them against himself.

Who is to determine whether the protection is fanciful, the danger real or imaginary, the witness mistaken or not? It is respectfully submitted that we must answer this question by saying that in such cases it is for the court to determine. Indeed, it seems that Judge Taft, in the course of an opinion in the *Irvine case* (74 Fed. Rep., 954), has laid down the essential and controlling principle as follows:

> The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. * * * It must appear to the court from the character of the question and the other facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

In that case Judge Taft quoted from the opinion of Chief Justice Marshall on the Burr trial (Fed. Cas., 14692e) on the point that it is the province of the court to judge of the criminating effect of direct answer to the question, and cites the English statement of the rule as laid down in *Regina* v. *Boyes* (1 Best & Smith, 329), followed and approved in *Ex parte Reynolds* (20 Ch. Div., 294), as follows:

> To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

Mr. Greenleaf, in his work on Evidence, has stated the American rule as follows:

> In regard to the privilege of witnesses in not being compellable to answer, the cases are distinguishable into several classes: (1) Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge. Here the authorities are exceedingly clear that the witness is not bound to answer. And he may claim the protection at any stage of the inquiry, whether he has already answered the question in part, or not at all. If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is protected. And whether it may tend to criminate or expose the witness is a point upon which the court are

bound to instruct him; *and which the court will determine, under all the circumstances of the case;* but without requiring the witness fully to explain how he might be incriminated by the answer which the truth would oblige him to give.

The rule stated by Chief Justice Marshall in Burr's trial was as follows:

> When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate him, then he must be the sole judge what his answer would be. The court can not participate with him in this judgment, because they can not decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims. * * * It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case a witness must himself judge what his answer will be, and if he say on oath that he can not answer, without accusing himself, he can not be compelled to answer.

It is evident that what the Chief Justice held in that case was that it was for the *court to determine* whether a direct answer to the question put *could* criminate the witness, and if it could, then it is for the witness to determine whether the answer *would* criminate him.

The doctrine announced by Chief Justice Marshall in the *Burr case* was applied by the supreme court of Iowa in *Richmond* v. *The State* (2 Greene, 532). In that case the witness was called before a grand jury and was asked to answer the following question:

> Q. Do you know of any person, other than yourself, being engaged in gaming at any time within two years, in the county of Muscatine?

The court said (p. 534):

> When it is evident to the mind of the court that the answer can not accuse the witness the court should require him to respond to the interrogatory. If this were not the case, it would be in the power of the witness, when called upon to give testimony in a criminal case, to refuse to do so. If he is to be sole judge whether the answer would implicate him by thus answering it would be impossible to elicit any testimony. Perjury could not only be committed with impunity by stating that the answer would criminate him, but the guilty would be screened from merited punishment. We can not sanction a rule fraught with such dangerous consequences. The direct tendency of such a rule would be to suppress truth and prevent the administration of justice. Therefore, we think the better and safer rule to be that of compelling the witness to answer when it is apparent to the court that

such answer would not interfere with his legal privilege. In this case, it was evident from the scope of the question that an answer could not possibly infringe upon this right, and yet the witness makes himself the judge and refuses the answer.

The position of the witness furnishes a familiar illustration of the evil consequences which would result from the enforcement of such a rule as he has contended for in the argument, and a most potent reason for the distinction which we have made.

In *Stevens* v. *The State* (50 Kans., 712) the court said:

> The rule, as we understand it, is to require the witness to answer when it is apparent to the court that an answer would not interfere with his legal right or privilege. If, however, the fact upon which he is interrogated forms but a single link in the chain of evidence which would lead to his conviction, he is protected. *And this is a matter for the court to determine, under the facts and circumstances surrounding each case.*

In *Minters* v. *The People* (139 Ill., 363) the court said (p. 366):

> If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is protected; *and whether it may tend to criminate or expose the witness is a point which the court will determine under all the circumstances of the case*, but without requiring the witness fully to explain how he might be incriminated by the answer which the truth would oblige him to give.

In *United States* v. *McCarthy* (18 Fed., 87) the court said:

> It is not sufficient to excuse the witness from answering that he may in his own mind think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

In *The People* v. *Mather* (4 Wend., 229) the court said (p. 254):

> My conclusion is that where a witness claims to be excused from answering a question because the answer may disgrace him or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on his moral turpitude. Where he claims to be excused from answering because his answer would have a tendency to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then *the court are to determine whether the answer he may give to the question can criminate him, directly or indirectly*, by furnishing direct evidence of his guilt, or by establishing one of the many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think that the answer *may* in any way incriminate him, they must allow his privilege, without exacting from him to

> explain how he would be criminated by the answer which the truth may oblige him to give.

The following Massachusetts cases hold that it is for the court, and not for the witness, to determine whether an answer could criminate him:

> *Commonwealth* v. *Willard*, 22 Pick., 476; *Commonwealth* v. *Kimball*, 24 Pick., 366.

In *Ex parte Senior* (37 Fla., 1) the court, after reviewing the authorities, said:

> While the witness must judge of the effect of his answer, and should not be required to explain how it will criminate him, yet the court must determine under all the circumstances of the case whether such will be its tendency from the question asked; and where, from the nature of the investigation and the character of the testimony sought, it reasonably appears that the answer may criminate or tend to criminate, the witness has the right to claim his privilege, and is not bound to answer.

The Supreme Court of North Carolina in *La Fontaine* v. *Southern Underwriters* (83 N. C., 132) carefully considered the case and said, at page 141:

> Upon a review of the authorities we are clearly of opinion that the view of the law propounded by Lord Wensleydale (10 Ex., 701) in *Osborn* v. *The London Dock Company*, and acted upon by Vice-Chancellor Stuart in *Sidebottom* v. *Adkins* (3 Jurist. N. S., 631–632), is the correct one; and that to entitle a party called as a witness to the privilege of silence

> the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is no reasonable ground to apprehend danger to the witness from his being compelled to answer.

See also *Floyd* v. *The State*, 7 Tex., 215; *Miskimmins* v. *Shaver*, 8 Wyo., 392–418.

A consideration of the above authorities make plain that the courts have almost universally taken the view that it is the province of the court to determine whether or not the witness *could* be incriminated by truthfully answering, and that it is then for the witness to determine whether the answers *would* incriminate him.

A careful examination of the cases in which the privilege was claimed and allowed will show that it was apparent from the question asked that a direct answer *could* incriminate the witness.

Attention is called to the following authorities:

The King v. *Gordon*, 2 Doug. K. B. Rep., 593.
Paxton v. *Douglas*, 19 Ves. Ch., 224.
Malony v. *Bartley*, 3 Campb., 210.
Cates v. *Hardacre*, 3 Taunt, 424.
Rex v. *Pegler*, 5 C. & P., 687.
Fisher v. *Ronalds*, 16 Eng. Lon. & Eq., 417.
Emery's case, 107 Mass., 172.
In re Graham, 8 Ben., 419.
Bank v. *Henry*, 2 Den., 155.
People ex rel. Taylor v. *Seaman*, 8 Miscel. (N. Y.), 152.
Cullen v. *Com.*, 24 Gratt., 624.
Smith v. *Smith*, 116 N. C., 386.
Lester v. *Boker*, 6 Blatch. (Ind.) 439

IV.

IT IS APPARENT FROM THE RECORD THAT THE WITNESS DID NOT INVOKE THE PROTECTION OF THE CONSTITUTION IN GOOD FAITH.

The subpœna duces tecum ordered the witness to produce before the grand jury the following:

> All stock books, cash books, ledgers, day-books, and journals of the business of the Lichtenstein Millinery Company covering the period from July 1, 1905, to July 1, 1909; also all books containing entries concerning or relating to importations of women's wearing apparel and materials thereof from Paris covering the period from July 1, 1905, to July 1, 1909; also all check books, check stub books, and all returned checks covering the same period, now in your custody, and all other deeds, evidences, and writings which you have in your custody or power concerning the premises.

In obedience to the subpœna, on July 28, 1909, the witness had produced certain of the documents, made no plea of privilege, and left the books produced in the custody of the grand jury for their examination. Later in the day the witness stated to the district attorney that the books were in daily use and that it would be a great hardship not to allow daily entries to be made therein, and asked to be permitted to temporarily withdraw them from the grand jury and return them, together with the other books called for in the subpœna, within a few days. Thereupon the

witness was permitted to withdraw the books temporarily from the grand-jury room pending their further examination. The record shows that a few days later, to wit, August 2, the witness refused to produce and allow the grand jury to examine any of the books or papers called for in the subpœna, and stated his refusal as follows:

> I refuse to produce them on the ground that they might tend to incriminate the *company* or myself.

On August 5, when the witness was asked if he had produced the books in obedience to the direction of the court, he replied:

> I refuse to produce them on the ground that they will incriminate me.

The grand jury was investigating alleged violations of the statutes of the United States by those engaged in importations of women's wearing apparel and materials thereof.

When the witness first claimed his privilege before the grand jury it was upon the ground that the books asked for might incriminate the corporation of which he was an officer or himself. In answer to certain questions submitted, he stated that he had nothing to do with the importation of such wearing apparel, that he never entered into any arrangement for their shipment, that he knew of no offense having been committed against the customs laws, and that he had never committed any such offense.

Attention is called to the following testimony on page 9 of the record in the habeas corpus case, No. 359:

Q. You haven't anything to do with the arrangements for shipping these model gowns to this country?

A. Nothing at all.

Q. They are made entirely by Jacob Lichtenstein?

A. When he is in Paris.

Q. You have never entered into any arrangements for their shipment?

A. No, sir.

Q. Have you any knowledge of any illicit importations of any of these gowns?

A. No, sir.

Q. Or any of your materials?

A. Nothing at all.

Q. You haven't any knowledge of any offense against the customs laws?

A. Nothing that I know of.

Q. You have never taken any part, to your knowledge, in any offense against the customs laws?

A. Not that I know of.

Q. You don't believe that you have been guilty of the commission of any crime in connection with the importation of any goods?

A. No; nothing at all.

Q. You have been subpœnaed to produce certain books?

A. I haven't produced them on the ground that it might incriminate myself or the *company* of which I am an officer.

It is apparent from the record that the witness, while nominally the secretary of the company, was in fact nothing more than the bookkeeper; that he was in nowise concerned with the criminality of his employers, even if they were guilty, and that he did not believe himself to be guilty of any crime, or that the production of the books would tend to criminate him.

The court below was evidently impressed that the witness was using his constitutional privilege to shield the corporation by which he was employed. The court no doubt determined from all the circumstances of the case, the subject of the inquiry before the grand jury, the relation of the witness thereto, and from the testimony which he gave, that he did not invoke the protection of the Constitution in good faith, and that he was therefore not privileged to refuse to produce the documents called for by the subpœna and to answer the questions put to him. The court no doubt reached the conclusion that it was not reasonable that the testimony attempted to be secured would be likely to incriminate the witness.

The cautionary words used by the court in *Brown* v. *Walker* (101 U. S., 591) seemed to describe the situation that was before the court below. The privilege had been put forward

> for a purely fanciful protection against the witness of an imaginary danger and for the real purpose of securing immunity to some third person who is interested in concealing

> the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others who are desirous of seeking shelter behind his privilege.

The witness had positively stated under oath that he had no knowledge of illicit importations, nor of any offense against the customs laws, that he had never taken part in any such offense, and that he had never been guilty of any crime in connection with the importation of any goods. It was therefore apparent to the grand jury and to the court, as stated in the record, that

> The witness was endeavoring to use the plea of privilege as a shield to others, and as to himself it was made frivolously and in bad faith. (Record, Error case, No. 358, p. 8.)

There is abundant authority for the proposition that the plea of privilege is personal to the witness and must be made in good faith on behalf of himself, and not to shield a corporation or a third person.

This court, in *Hale* v. *Henkel* (201 U. S., 43–69) held as follows:

> The right of a person under the fifth amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were

> the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. * * * The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and if he can not set up the privilege of a third person, he certainly can not set up the privilege of a corporation. * * * Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection.

The privilege has become deeply fixed in our system of jurisprudence and will never be abolished, and every consideration of a proper protection of the body politic demands that the privilege should not be extended beyond the limits which are to be fixed by reference to its historical origin. This means that it must be confined to the beneficent protection of the privilege to witnesses in their personal and not their representative capacity.

Professor Wigmore has shown in a very learned review of the historical origin of the privilege that in England both in the ecclesiastical and common law courts it arose from considerations based solely upon the situation of the individual in his capacity as a witness. He has pointed out the danger of

extending the privilege in the following words (Wigmore on Evidence, p. 3101):

> In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. * * * Indirectly and ultimately it works for good—for the good of the innocent accused and of the community at large. But directly and concretely it works for ill—for the protection of the guilty and the consequent derangement of civic order. * * * (p. 3102). The privilege therefore should be kept within limits, the strictest possible. A multiplicity of statutes have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.

And again he says (p. 3107):

> To invoke the sentiments of lofty indignation and of courageous self-respect against the arbitrary methods of royal tyrants and religious bigots, holding an inquisition to enforce cruel decrees of the prerogative, and torturing their victims with rack and stake, is fitting and laudable, and moves men with a just sympathy. But to apply the same terms to the orderly, everyday processes of the witness stand, in a community governing itself in freedom by the will of the majority and having on its statute book no law which was not put there by itself and can not be repealed to-morrow, a community, moreover, cursed

> above others by constant evasion of the law and by and by overlaxity of criminal procedure, this is to maltreat language, to enervate virile ideas, to abuse true sentiment, to degrade the Constitution, and to make hopeless the correct adjustment of the best motives of human nature to the facts of life.

Every consideration that arises from conditions of modern civilization requires that the rule should not be extended further than is necessary to accomplish its original purpose of caring for the *personal rights of individuals.*

In Greenleaf on Evidence (16th ed.), 469 d (and cases cited in notes), it is said:

> Being intended solely for the witness's sake, the privilege is his own, and not that of the party; counsel therefore will not be allowed to make the objection.

See also

Commonwealth v. *Shaw*, 4 Cush., 594.
Phillipps on Evidence (4th Am. ed.), p. 935.

In *Reynolds* v. *Reynolds* (1882, 15 Cox. Cr., 108, 115), Judge Jessel said:

> Perhaps our law has gone even too far in that direction; and, without impugning the policy of the law, there certainly must be a larger policy of the law which requires a person to answer, where the judge thinks that he is not *bona fide* objecting with the view of claiming the privilege to protect himself, but to prevent other parties getting that testimony which is necessary for the purposes of justice.

Professor Wigmore has admirably stated the duty of citizens giving testimony and the power of courts to require it in the following language:

> When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon. * * * The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness * * *.
>
> It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit.
>
> The trend of the day is to expend them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The in-

> vestigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice. (3 Wigmore, pp. 2967–2968.)

The learned author quotes Bentham from a certain report of English Commissioners on Criminal Law, and from Stephens's History of the Criminal Law, and then proceeds as follows (p. 3102):

> It is enough for justice and for the Commonwealth that the privilege exists, immovably fixed in the Constitution. The good which it aims at consists in that general fact and system and not in the individual application of it to a given claimant. *That* effects mostly harm—a particular harm which we suffer from the larger good.
>
> The privilege therefore should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much can be settled by a consideration of its historic scope before constitutions were made; but, after all this, the decision will constantly depend upon whether the privilege is approached with favor or with disfavor, with fatuous adulation or with judicious appreciation. In the past twenty years, and especially in a few American courts, this practical difference of

> effect is plainly apparent; for, under the guise of reasoning and interpreting, the privilege has by them, in a spirit of implicit favor, been so extended in application beyond its previous limits as almost to be incredible, certainly to defy common sense. Even Lord Hardwicke, who a century and a half ago called it "a rule of great justice and tenderness" (citing *Harrison* v. *Southcote*, 2 Ves. Sr., 389, 394), could he now revisit the glimpses of the moon and observe the rule in those courts, would marvel what manner of justice we have contrived. But a reaction must come. A true conservation must recommence to operate. More than one great modern judge is found to pronounce against the favor that has in the past been granted to it. A multiplicity of statutes have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.

Similar cases heretofore decided show that this court will look beyond the commitment in its recitals into the evidence and circumstances upon which the committing court acted.

In previous cases the whole proceeding, together with all the evidence given by the witness and the action of the court, was examined on habeas corpus. This was especially true in the Counselman case.

This court therefore has before it the question whether or not the court erred in holding that it did not reasonably appear that the evidence sought to be

produced could tend to criminate the witness. Or to state it another way, after the witness had stated, under oath, his duties and that he had not violated any of the customs laws, was there reasonable ground to apprehend that the production of the books would tend to incriminate him?

In cases of this kind the danger to be apprehended must be real with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency. It must appear to the court that there is some danger and substantial probability that the testimony of a witness may help to convict him of a crime.

In the petition for habeas corpus it is stated that the production of the books of said company might be competent evidence against the witness for the prosecution of frauds on the revenue under section 9 of the customs administrative act of June 10, 1890. Said section provided:

> That if any owner, importer, consignee, agent, or other person, shall make or attempt to make any entry of imported merchandise by means of any fraduulent or false invoice, etc., by means whereof the United States shall be deprived of the lawful duties, * * * such person shall be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years * * *. (26 Stat. L., p. 135.)

It is respectfully submitted that the testimony taken before the grand jury shows that this claim is

not bona fide. The court committing the witness for contempt, and the other court in dismissing the writ of habeas corpus, both saw from a personal perception of the peculiarities of the case that the privilege was not claimed in good faith.

It is respectfully submitted that the protection guaranteed by the fifth amendment does not reach a case such as is now before this court. It does not permit or justify an employee or officer of a corporation in refusing to produce the documents belonging to the corporation or permit their examination under proper judicial process. How are the books of a corporation ever to be brought forth if the officer of such corporation is permitted to take an oath that he had not committed any crime and then to say that the books will incriminate him? If the day has come when an officer of a corporation can be excused from producing its records by merely making the assertion that the production of testimony might tend to incriminate him, although he has no knowledge of having committed any crime, then courts and juries will possess no real authority in performing their function to investigate crimes, to indict and punish offenders, and to compel obedience by proper judicial process and orders.

It is difficult to imagine a case where custom frauds and other offenses and violations of the national-bank act on the part of corporations can be punished if its officers, claiming to have no knowledge of any offense and not having participated in any illegal transaction, are permitted to successfully

raise the plea, when asked to produce records, that although they have committed no crime, yet the books might incriminate them.

When the framers of the Constitution wrote that no persons shall be compelled to give testimony in any criminal case against themselves, they intended to *adopt the common-law doctrine of protection*, and the question of bad faith was always regarded by the English courts as material in determining whether a question would subject the witness to prosecution.

On the whole case we believe that the evidence before the court, and the circumstances under which the evidence was sought to be produced, show that there was no reasonable ground to believe that the testimony *could* tend to incriminate the witness, and further that the witness did not believe it *would* incriminate him.

V.

THE WITNESS HAD WAIVED HIS PRIVILEGE.

The record shows that the witness had produced certain books before the grand jury on July 28, with the statement that the others would be produced as soon as they could be gotten together; that after the witness had retired from the grand-jury room his counsel arranged with the district attorney that the books should be temporarily withdrawn, and the assurance was given that they would be returned the following Monday. When the witness appeared before the grand jury on said day he refused to

produce the books on the ground that they might incriminate the company or himself, he having in the meantime changed counsel. The witness had, however, testified as to the business of the company of which he was an officer, as to his duties therein, and made the statements heretofore referred to, to wit, that he had nothing to do with the importations; that he knew of no offense having been committed against the customs laws, and that he had not participated in any such offense.

It is respectfully submitted that under such circumstances the witness had waived the privilege of silence guaranteed by the Constitution. A witness may waive such privilege just as he can waive the right of trial by jury or any other privilege afforded him by the Constitution. The privilege is personal, and he must claim it himself at the outset of the proceeding. It is well settled that where a witness has testified to facts which might tend to criminate him that he can not claim his privilege as to other facts relating to the same transaction; and where a witness has made certain statements with reference to a matter he can not be permitted to refuse to disclose other statements in connection therewith. If a witness discloses a part of a transaction with which he was criminally concerned without claiming his privilege, he must disclose the whole.

People v. *Freshour*, 55 Cal., 375.
Coburn v. *Odell*, 10 Fost. (N. H.), 540.

In *Foster* v. *Pierce* (65 Mass., 439) the court said:

> It would seem quite reasonable to go somewhat further than the present case requires and adopt the broad principle that the witness must claim his privilege in the outset when the testimony he is about to give will, if he answers fully all that appertains to it, expose him to a criminal charge, and *if he does not he waives it altogether.*

In *Chamberlain* v. *Wilson* (12 Vt., 491), the principle is directly held that if a witness submit himself to testify to the very matter tending to criminate himself without claiming his privilege, he must submit to a full cross-examination.

In *Com.* v. *Nichols* (114 Mass., 285), the court said:

> By the common law a witness can not be obliged to criminate himself, and may therefore refuse to testify to any facts which will tend to prove him guilty of a crime. But his refusal must be made at the beginning of his examination upon the issue whether a crime has been committed by him. If he answers any questions upon that subject, he can not afterwards interpose his privilege, but is liable to be fully examined and cross-examined upon the matter.

There are many authorities to the effect that when a person charged with the commission of a crime becomes a witness and testifies that he did not commit it, he waives his constitutional privilege as to criminating himself and may be cross-examined as to everything relevant to the issue.

A witness who has voluntarily testified in part on a matter tending to criminate can not afterwards decline to answer a question upon the ground that it will criminate him.

Commonwealth v. *Pratt*, 126 Mass., 462.
Commonwealth v. *Price*, 10 Gray, 472.
People v. *Carroll*, 3 Park. (N. Y. Cr.), 83.

In *Low* v. *Mitchell* (18 Me., 372) the court says:

> The rule that a witness is not obliged to criminate himself is well established. It is contended, however, that if the witness waives that privilege when testifying to one fact in the cause, he can not claim it while testifying to any other fact material to the issue. If he consents to testify to one matter tending to criminate himself, he must testify fully in all respects relative to that matter so far as material to the issue. If he waives the privilege he does so fully in relation to that act. But he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue.

In *Evans* v. *O'Connor* (174 Mass., 287), on page 291, the court quotes *Low* v. *Mitchell* with approval, adding:

> If, however, within the legitimate limits of cross-examination as to the facts testified to, an inquiry is started as to other facts, the witness must be considered as having waived his privilege as to the latter, so far as the inquiry as to them is within such limits, and he must answer even though his answers may tend to criminate him.

In *State* v. *Nichols* (29 Minn., 357) on page 358, the court says:

> The witness could waive his privilege, whereby he was protected from criminating himself. He did waive it when he voluntarily testified, as he did, in behalf of the defendant. He must have seen that a disclosure of the whole truth would be self-incriminating, and, having voluntarily testified to material facts in favor of the defendant when he might have claimed his privilege, and should have done so, unless he elected to abandon it, he could not deprive the adverse party of the right of cross-examination, by setting up his privilege.

In *State* v. *Foster* (23 N. H., 348), at page 354, referring to the question of privilege, the court says:

> He is not bound to disclose any facts which will subject him to a criminal prosecution. But the privilege is that of the witness and not of the party, and it lies with the witness to claim it or not, as he may choose. If the witness waives his privilege and answers the questions, even though the answers may show he is guilty of an infamous crime, yet he will not thereby be rendered incompetent. * * * And where a witness discloses part of a transaction, in which he was criminally concerned, without claiming his privilege, he is then bound to go forward and state the whole.

A fair exposition of the rule laid down in these American decisions may be found in the case of *State* v. *K* (4 N. H., 562). K was charged with unlawfully disinterring a dead body. Upon the

trial a witness was called in his behalf, who stated that he knew the respondent to be innocent, but that he could not tell how he knew without implicating himself, and he inquired of the court whether he was bound to testify at all, and, if so, how far he was compelled to go. The court held that the witness could not be compelled to declare that he knew the respondent to be innocent if a full explanation would tend to criminate himself, but that if he chose to testify at all he must state how he knew that the defendant was not guilty.

In *Brown* v. *Walker* (161 U. S., pp. 591–597), this court said:

> Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that if the testimony sought can not possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else—much less that it shall be made use of as a pretext for securing immunity to others.
>
> Thus, if the witness himself *elects to waive his privilege, as he may doubtless do,* since the privilege is for his protection and not for that of other parties, and *discloses his criminal connections,* he is not permitted to stop, but must go on and make a full disclosure. (1 Greenleaf on Ev., 451; *Dixon* v. *Vale,* 1 C. &

P., 278; *East* v. *Chapman*, 2 C. & P., 570; S. C. M. & M., 46; *State* v. *K.*, 4 N. H., 562; *Low* v. *Mitchell*, 18 Maine, 372; *Coburn* v. *Odell*, 10 Fost. (N. H.) 540; *Norfolk* v. *Gaylord*, 28 Connecticut, 309; *Austin* v. *Poiner*, 1 Sim 348; *Commonwealth* v. *Pratt*, 126 Mass. 462; *Chamberlain* v. *Willson*, 12 Vermont, 491; *Lockett* v. *State*, 63 Alabama, 5; *People* v. *Freshour*, 55 California, 375.)

So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. (*State* v. *Wentworth*, 65 Maine, 234; *State* v. *Witham*, 72 Maine, 531; *State* v. *Ober*, 52 N. H., 492; *Commonwealth* v. *Bonner*, 97 Mass., 587; *Commonwealth* v. *Morgan*, 107 Mass., 199; *Commonwealth* v. *Mullen*, 97 Mass., 545; *Connors* v. *People*, 50 N. Y., 240; *People* v. *Casey*, 72 N. Y., 393.)

In the case at bar, since the witness appeared before the grand jury and produced part of the books called for and testified in part, without claiming his constitutional protection, he must be deemed to have waived his privilege.

The privilege against self-incrimination is a privilege against disclosure, and the disclosure once having been made, the privilege is at an end. In this case the books which had been produced before the grand jury must be deemed to have been in the custody of the grand jury, although temporarily withdrawn by the witness, and in such case the disclosure was

complete and the privilege could no longer be claimed.

It would seem to be contempt of court for the witness, after certain of the books of the corporation had been produced, to withdraw them temporarily from the grand jury on the plea that the corporation needed them, and then refuse to return them. The books were not the private books and documents of the witness, but they were the books of the corporation and had been surrendered by its officer in response to an order.

VI.

THE WRIT OF HABEAS CORPUS WAS PROPERLY DISMISSED.

It is respectfully submitted that the judgment of the lower court on the writ of habeas corpus was wholly correct and the appeal therefrom should be dismissed. The record shows that Judge Hand, United States district judge for the Southern District of New York, while acting as circuit judge, issued the order and committed the witness to the custody of the United States marshal for the contempt set out. On the writ of habeas corpus the witness Dreier was taken before Judge Hough, another United States district judge for the same district, who, upon hearing, dismissed the writ and remanded the witness to custody. In deciding the case Judge Hough said:

> The court had jurisdiction, both of the defendant and the subject-matter; and the allegation now made is exactly that it erred in

not adjudging that Dreier should have been discharged, and not punished.

Since the error alleged consists (if it exists) in violating a constitutional right, it seems clear that Dreier was entitled to his writ and a hearing thereon. (*Re Neilsen*, 131 U. S., 176.) And in *Hale* v. *Henkel* (201 U. S., 43) an order adjudging a witness in contempt was in effect reviewed, on appeal from an order denying discharge under habeas corpus issuing from the same court and heard by a judge of the same jurisdictional power as the one who had committed the relator.

Yet as a general rule a habeas can not be used to fulfill the function of a writ of error. This rule has generally been announced in cases where either a writ would not lie or where an appeal in habeas corpus proceedings seemed a quicker or cheaper method of review.

It is difficult for me to reconcile the decisions on this point; but this much is clear, that where a writ of error affords to one imprisoned a remedy—ample, complete, and prompt—it is highly undesirable that one judge should liberate on habeas a man duly adjudged in contempt by another judicial officer of identical jurisdiction and sitting in the same court.

The present application demands that I hold (in effect) that Hand, J., erred in deciding against Dreier's claim of privilege. That error (if committed) can be corrected by writ of error. (*Nelson* v. *U. S.*, 201 U. S., 92; *Alexander* v. *U. S.*, 201 U. S., at p. 122; and

see especially *Ballman* v. *Fagin*, 200 U. S., 186, where the constitutional question was taken up by appeal in habeas, and writ to the judgment.)

This matter needs elucidation, and the tendency toward using habeas corpus to correct mere errors needs further curbing.

The present case as submitted in argument is an illustration of the dangers of "short cuts" in practice. On writ of error a bill of exceptions must be prepared, and it seemed clear to me on discussion that such bill would be a far fairer and more ample method of presenting the serious question suggested than the hurried habeas papers.

While the courts of the United States have power on habeas corpus to inquire into the cause of the detention of any one claiming to be restrained of his liberty in violation of the Constitution, yet in the case at bar the circumstances were such that the court had a discretion whether it would limit the witness to his writ of error to determine whether or not his privilege was properly claimed. There was no reason shown why the witness could not fully and fairly present the question in this way, and since the writ was heard before a judicial officer of identical jurisdiction there was no error in his decision dismissing the writ. The writ can not be used as a mere writ of error for the correction of errors in the judgment or proceedings under and by virtue of which a party has been imprisoned.

There are numerous authorities to the effect that a writ of habeas corpus can not be made to perform the functions of a writ of error or an appeal. Where a person is in custody under a judgment or order of a court of competent jurisdiction, he can not obtain his discharge on habeas corpus on account of mere errors or irregularities in the judgment or in the proceeding on which his judgment was founded.

Attention is called to the following authorities:

In re Lennon, 166 U. S., 552.
In re Eckart, 166 U. S., 481.
Reid v. *Jones*, 187 U. S., 153.
Ex parte Ayers, 123 U. S., 443.
Valentina v. *Mercer*, 201 U. S., 131.

The United States judge who committed the witness to custody had jurisdiction of the person and the subject-matter. There was no irregularity in the commitment. Another judge of identical jurisdiction was asked to substitute his judgment for that of the committing Magistrate. He had a discretion to refuse to discharge the prisoner under such circumstances.

The writ of habeas corpus was not designed, nor can it be used, to discharge a prisoner who is in custody by virtue of a judgment, sentence, order, or decree of a court of competent jurisdiction. (Am. & Eng. Enc. of Law (2d ed.), vol. 15, p. 166.)

Courts have inherent power to punish for contempts, and their decisions can not be attacked collaterally by habeas corpus where the commitment is regular on its face and the court has jurisdiction. No matter

how erroneous an order, judgment, or decree of a court may be, a person committed for contempt, in refusing to comply with it, can not attack it on habeas corpus. See Am. & Eng. Enc. of Law (2d ed.), vol. 15, p. 177, and authorities therein cited.

It is therefore respectfully submitted that Judge Hough was not bound to inquire into the cause of the commitment or into the merits of the case when it was shown that the witness was imprisoned under legal process issued by a court having jurisdiction of the person and the subject-matter, and therefore properly refused to discharge the witness.

CONCLUSION.

Every citizen owes a solemn and important duty to give testimony when called before a lawful judicial tribunal. He is privileged to decline only when his answers may tend to criminate him. Courts should not be trifled with on this proposition. The court is to determine, from the circumstances surrounding the case, whether or not the testimony sought could incriminate the witness, and the witness is then to say that it would. The privilege must be claimed at the outset and can not be invoked after part of the disclosure has been made. The constitutional protection must be sought in good faith, and the privilege is personal to the witness. Our system of jurisprudence does not permit a witness to refuse to answer simply because he prefers not to or because he desires to protect his employer. Where the reason of the privilege ceases, the privilege also ceases, and the witness may waive

that privilege. When these principles are applied to the case at bar it will be seen that there was no error made by the court in committing the plaintiff in error for contempt, and that the writ of habeas corpus was properly dismissed.

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